84-399

No. .....

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In The

Supreme Court of the United States

October Term, 1984

GERARD O. BREATH, INDIVIDUALLY, D/B/A THE ROACH COACH AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

VERSUS

ALWYNN J. CRONVICH, ESQ., HONORABLE HARRY LEE AND HONORABLE EDWIN W. EDWARDS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) Are the requirements of the Due Process Clause met by a government's vehicle towing and impoundment operation which, (a) in the majority of instances provides only for telephone notification that a tow and impoundment has occurred despite the vehicle owners' names and addresses being readily available; (b) in practice allows impounded vehicles to be released only upon the prepayment in cash of non-refundable towing and storage charges; and (c) gives no notice whatsoever of the options available to vehicle owners for recovery of their vehicles other than by prepayment of the fees or of any avenues of redress for potentially erroneous assessments?

(2) Is the state statute which is related to the challenged vehicle towing and impoundment operation, silent on provision for notice of its contents as well as for post-seizure notice and an opportunity for a hearing, and which authorizes the release of an impounded vehicle only on full satisfaction of all penalties or charges assessed on account of the parking infraction, except upon the execution of an appearance bond in the maximum amount of such penalties and charges, violative of the Due Process Clause?

(3) Are the requirements of the Due Process Clause met by a government's vehicle towing and impoundment operation which relies on a statutory bond scheme as an alternative to payment of towing and storage fees as a precondition to securing release of a seized vehicle and which presumes that the public knows of the existence of the bond scheme, particularly where government employees and their agents (contractees) misrepresented or concealed the existence of the statutory alternative and/or refused to apply the law?

QUESTIONS PRESENTED FOR REVIEW CONTINUED

(4) In a vehicle ticketing, towing and impoundment setting, does the trial on the alleged parking infraction serve to satisfy the hearing requirement of the Due Process Clause where it is not closely related in time to the vehicle seizure and where the ticketed party's interests in (a) access to and use of his towed and impounded vehicle and in (b) the towing and storage charges he was required to pay in order that his vehicle be released are not at issue therein?

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

1. Gerard O. Breath, individually, d/b/a The Roach Coach and on behalf of all others similarly situated, Plaintiffs-Appellees/Cross-Appellants/Petitioners herein
2. Lloyd Brown, Plaintiff-Appellee
3. Alwynn J. Cronvich, Esq., Defendant-Appellant/Cross-Appellee/Respondent herein
4. Honorable Harry Lee, Defendant-Appellant/Cross-Appellee/Respondent herein
5. Honorable Edwin W. Edwards, Defendant-Appellant/Cross-Appellee/Respondent herein (Gov. Edwards succeeded former Gov. Treen on March 12, 1984)

TABLE OF CONTENTS

	Pages
Questions Presented for Review	i
Parties to the Proceedings in Court of Appeals	iii
Table of Contents	iv
Table of Authorities	v
Opinions Delivered in the Courts Below	1
Statement of the Grounds on Which Jurisdiction is Invoked	1
Constitutional Provisions and Statutes	1
Statement of the Case	2
Argument	10
Conclusion	27
Appendix A-1—Opinion of the United States Court of Appeals for the Fifth Circuit of 4/16/84	App. 1
Appendix A-2—Opinion on Rehearing by the United States Court of Appeals for the Fifth Circuit of 6/14/84	App. 18
Appendix A-3—Amended Judgment of the District Court of 7/7/83	App. 21
Appendix A-4—Judgment of the District Court of 1/6/83	App. 25
Appendix A-5—Minute Entry by the District Court of 9/19/78	App. 27
Appendix A-6—Memorandum Opinion and Order of the District Court of 9/26/78	App. 29
Appendix A-7—Memorandum Opinion and Order by the District Court of 7/21/77	App. 58
Appendix A-8—Memorandum Opinion and Order by the District Court of 4/6/78	App. 72

TABLE OF AUTHORITIES—Continued

Pages

Appendix A-9—Transcription of Proceedings in the First Parish Court for the Parish of Jefferson of 5/6/77 ..... App. 82

Appendix A-10—The post card to be mailed as a result of an impoundment in the JPSO auto pound ..... App. 88

Appendix A-11—The letter to be mailed in case the post card is returned unclaimed ..... App. 89

Appendix A-12—Verbatim text of constitutional provisions and statutes ..... App. 91

TABLE OF AUTHORITIES

CASES:

Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1970) 11

Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586 (1971) 13

Covey v. Somers, 351 U.S. 141, 76 S.Ct. 724 (1956) 18

Craig v. Carson, 449 F.Supp. 385 (MD Fla., Jacksonville Div. 1978) 12

Evans v. Newton, 382 U.S. 296, 86 S.Ct. 486 (1966) 11

Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983 (1972) 13, 21, 25

Gillam v. Landrieu, 455 F.Supp. 1030 (ED La. 1978) 12, 19

Goichman v. Rheuban Motors, Inc., 682 F.2d 1320 (9th Cir. 1982) 11, 12

Graff v. Nicholl, 370 F.Supp. 974 (ND Ill. 1974) 13

Guzman v. Western State Bank, 516 F.2d 125 (8th Cir. 1975) 11

Hale v. Tyree, 491 F.Supp. 622 (ED Tenn. N.D. 1979) 12

TABLE OF AUTHORITIES—Continued

Pages

Huemmer v. Mayor and City Council of Ocean City, Maryland, 632 F.2d 371 (4th Cir. 1980) 12, 24

Lambert v. California, 355 U.S. 225, 78 S.Ct. 240 (1957) 24

Lee v. Thornton, 538 F.2d 27 (2nd Cir. 1976) 11

Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148 (1982) 26, 27

Luger v. Edmonson Oil Co., Inc., — U.S. —, 102 S.Ct. 2744 (1982) 11

Marsh v. Alabama, 326 U.S. 501, 66 S Ct. 276 (1946) 11

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976) 13

McKee v. Heggy, 703 F.2d 479 (10th Cir. 1983) 12

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 98 S.Ct. 1554 (1978) 15, 21, 22

Mennonite Board of Missions v. Adams, 462 U.S. —, 103 S.Ct. 2706 (1983) 15, 17

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652 (1950) 15

North Laramie Land Co. v. Hoffman, 268 U.S. 276, 45 S.Ct. 491 (1925) 23

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1982) 26, 27

Price v. City of Junction, Texas, 711 F.2d 582 (5th Cir. 1983) 11

Remm v. Landrieu, 418 F. Supp. 542 (ED La. 1976) 12, 20, 21

Rutherford v. United States, 702 F.2d 580 (5th Cir. 1983) 27

Stypmann v. City & County of San Francisco, 557 F.2d 1338 (9th Cir. 1977) 11, 14

TABLE OF AUTHORITIES—Continued

Pages

Sutton v. City of Milwaukee, 672 F.2d 644 (7th Cir. 1982) 12

Tedeschi v. Blackwood, 410 F.Supp. 34 (D. Conn. 1976) 11

Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809 (1953) 11

Texaco Inc. v. Short, 454 U.S. 516, 102 S.Ct. 781 (1982) 23

United States v. Price, 383 U.S. 787, 86 S.Ct. 1152 (1966) 11

Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230 (1973) 23

Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428 (1977) 11

U. S. CONSTITUTION:

Amendment 14 ..... 1, 11, 26

STATUTES:

28 U.S.C.A. 1254 1

28 U.S.C.A. 1343 1

28 U.S.C.A. 2201 1

28 U.S.C.A. 2202 1

42 U.S.C.A. 1983 ..... 1, 26, 27

La.Rev.Stat.Ann. 15:88 1

La.Rev.Stat.Ann. 32:143 ..... 1, 3, 4

La.Rev.Stat.Ann. 32:392 ..... 1, 3, 9

La.Rev.Stat.Ann. 32:411 ..... 1, 20

OPINIONS DELIVERED IN THE COURTS BELOW

The Memorandum Opinion and Order of the district court holding that the challenged vehicle towing and impoundment procedures and related state statute are unconstitutional, entered on September 26, 1978, is an unreported decision reproduced in the Appendix hereto, A-6. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 729 F.2d 1006 (5th Cir. 1984), Appendix A-1, and the Per Curiam opinion on Rehearing is reported at 734 F.2d 225 (5th Cir. 1984), Appendix A-2.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The decree of the United States Court of Appeals for the Fifth Circuit sought to be reviewed herein was entered on April 16, 1984 and the Per Curiam opinion denying the Petition for Rehearing and Suggestion of Rehearing En Banc was entered on June 14, 1984. This Court has jurisdiction to hear this petition pursuant to 28 USCA §1254(1) and it has been filed within the time required by 28 USCA §2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S.C.A. Constitution Amend. 14
28 USCA § 1343
28 USCA § 2201
28 USCA § 2202
42 USCA § 1983
La.Rev.Stat.Ann. 15:88
La.Rev.Stat.Ann. 32:143(A)
La.Rev.Stat.Ann. 32:392(B)
La.Rev.Stat.Ann. 32:411, as amended

Due to their length, the foregoing constitutional provisions and states are set forth verbatim in the Appendix hereto, A-12.

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STATEMENT OF THE CASE

This case involves a challenge on procedural due process grounds to the Sheriff's practice in Jefferson Parish, Louisiana, adjacent to the City of New Orleans, of towing and impounding vehicles found to be illegally-parked and requiring the prepayment of non-refundable towing and storage fees in order that the owners obtain release of their vehicles. Plaintiff Breath filed suit seeking individual and classwide injunctive, declaratory and restitutional relief, as well as individual damages, costs and attorneys' fees, for a class of persons who had been or would in the future be subjected to the challenged procedures and who had paid non-refundable towing and impoundment fees.[1] Parties then or later named as defendants included the Sheriff of Jefferson Parish, four private towing entities who towed and impounded for the Sheriff by contract and the Governor of the State of Louisiana. Several weeks later, plaintiff Brown filed suit seeking similar relief and the suits were consolidated.

In a series of orders the district court declined to dismiss on jurisdictional or abstention grounds, maintained the Breath suit as a proper class action for injunctive and declaratory relief per Rule 23(b)(2), F.R.Civ.P.,[2] and dis-

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[1] The suit was predicated on 42 USCA § 1983 and federal jurisdiction was invoked pursuant to 28 USCA § 1343(3) and (4) (civil rights) and 28 USCA §§ 2201, 2202 (declaratory judgments). The district court's pendent jurisdiction was also invoked with respect to related state claims.

[2] After later rendering equitable relief, the district court, on joint motion of the parties, entered an order dismissing

(Continued on next page)

missed the contract towers on their plea of qualified immunity.[3] The district court ultimately declared the Sheriff's practices, as well as those provisions of La.Rev.Stat. Ann. 32:392 (West Supp. 1984; see Appendix A-12) which relate to the seizure and retention of unoccupied vehicles found in violation of La.Rev.State.Ann. 32:143(A) (West 1963; see Appendix A-12), to be unconstitutional in failing to provide adequate due process protections and permanently enjoined the Sheriff from engaging in the challenged activity. See Amended Judgment of July 7, 1983, Appendix A-3. In later orders, the district court rejected former Sheriff Cronvich's plea of qualified immunity[4] and awarded Breath special damages (restitution of his towing fee [$20.00] and vehicle repairs [$190.50]), general damages ($1,000.00), costs and attorneys' fees, awarded

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(Continued from previous page)

the class allegations insofar as restitutional relief for the class, though not Breath individually, was concerned. Due to ill-kept, illegible and in some instances non-existent records from the four contract towers and the JPSO's own auto yard which precluded verifiable cross-referencing with the records of the First and Second Parish Courts, the identities of a sufficient number of persons in the sub-class (i.e. those persons who had paid non-refundable towing and storage fees, but who had later been exonerated from the alleged parking infractions) to satisfy the numerosity requirement of Rule 23(a)(1), F.R. Civ.P., could not be discovered, only 16-21 putative class members being concretely identified.

[3] The district court held that ". . . it would be unrealistic to hold commercial entities to the same awareness of their conduct's constitutional implications as we do the official(s) at whose behest and under whose aegis they acted" and was disinclined to retain the towing companies as parties simply for the purposes of equitable relief. See Mem. Opinion and Order of 4/6/77 at pp. 16-17, Appendix A-8, and Mem. Opinion and Order of 7/21/77 at pp. 7-8, Appendix A-7.

[4] The district court found that Cronvich, a licensed attorney since 1948, failed both the subjective and objective tests of the qualified immunity defense as it then existed because *inter alia* he should have known better. See Mem. Opinion and Order of 7/21/77, pp. 8-12, Appendix A-7, and *Cronvich* depos. at p. 4 [fn. 6 *infra*].

Brown costs and attorneys' fees and distributed the awards among the three remaining defendants: (1) Ex-Sheriff Cronvich of the Jefferson Parish Sheriff's Office (JPSO), in his individual capacity; (2) present Sheriff Harry Lee, in his official capacity; and (3) the Governor of Louisiana, in his official capacity. Defendants appealed, contending that the JPSO practices and statute are constitutional, that Sheriff Cronvich is entitled to qualified immunity and that the award of attorneys' fees was excessive. Plaintiff Breath and the class cross-appealed, maintaining that the attorneys' fee award was inadequate. The Court of Appeals found the JPSO practices and statute to be constitutional, reversing the district court's judgment and, on rehearing, remanded the case so that the district court may decide whether to consider pendent state law claims which had not been reached. See Appendix A-1, A-2.

In the early evening of August 20, 1976, at the request of a JPSO deputy, plaintiff Breath's pickup truck was towed from its location on a residential street in Jefferson Parish where it had been parked and left unoccupied while Breath, a pest exterminator, was working inside a nearby apartment building. In the opinion of the deputy, the pickup truck was parked too close to an intersection and was obstructing the view into the intersection. The officer cited Breath under La.Rev.Stat.Ann. 32:143 (A) for "parking in an intersection causing the obstruction of view" and had the truck towed and impounded by a contract tower. Breath, not finding his vehicle on completion of his work a short time later, called the JPSO to report that it had been stolen. On this first contact the JPSO had no information about his vehicle, though when he later called back (after getting a relative to come and pick him up), he was informed of the tow and of his vehicle's location at the yard of Bayou Wreckers. On ar-

riving there he protested that his truck had not been left blocking the intersection and that he was totally innocent of any parking infraction. Nonetheless, he was required to present verification of ownership and to pay $20.00 in cash for the towing fee in order that his vehicle be released. He was given a parking ticket with an arraignment date indicated thereon. By this time several hours had passed and Breath had missed an exhibition professional football game for which he had already purchased two tickets. On his way home, Breath noticed that the front end of his pickup was shaking and corrective repairs were later required.

At arraignment Breath plead not guilty and, in proceedings in the First Parish Court for the Parish of Jefferson which occurred some 8½ months after the tow, his Motion to Quash the ticket was granted because of a dicrepancy between the violation charged and information contained in the Bill of Particulars ("parking on a sidewalk"). The court did not grant Breath's request for a refund of the $20.00 towing fee he had paid, indicating that no mechanism existed to secure its return notwithstanding his exoneration from the parking violation. See Transcription of Proceedings in First Parish Court, pp. 6-7, Appendix A-9. At no point was Breath afforded an opportunity to challenge either the tow and impoundment of his pickup truck or the fact that he was required to pay the towing fee in order that his truck be released.

On July 17, 1976, Brown (later found to be a member of the class represented by Breath; see Mem. Opinion and Order of 9/26/78, p. 4 fn. 7, Appendix A-6) reported to the New Orleans Police Department that his car, which had been purchased a few days earlier, had been stolen. The vehicle was subsequently discovered blocking a residential driveway in Jefferson Parish. Because the

State's vehicle registration records still showed the owner of the vehicle to be one Joseph Banks, Brown's predecessor in title, Brown was not informed that his vehicle had been found until September 13, 1976. When he appeared at the yard of the contract tower (Jaegers, Inc.) who had towed his car for the JPSO, he was told that his car had been discovered illegally parked and that he could recover it only by paying in cash the accrued towing and storage charges which by then amounted to $120.00. Brown was able to secure release of his vehicle without payment of charges after he obtained a conference with the Sheriff's Chief Criminal Deputy.[5]

Pliantiffs argued below that the JPSO towing and impoundment practices, as well as the related state statute, violated their rights under the Due Process Clause. The consolidated cases were tried on deposition testimony and stipulations, and detailed findings of fact were included in the district court's Memorandum Opinion and Order of 9/26/78, Appendix A-6, which held that the practices and statute were unconstitutional. The factual predicate for the district court's declaratory judgment and permanent injunction was as follows:[6]

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[5] In its rendition of the facts, the Fifth Circuit panel majority, 729 F.2d at p. 1009, Appendix A-1, related that Brown met with a JPSO Chief Deputy who, upon hearing the facts, arranged for Brown's car to be released without payment of charges. This, however, is an overly narrow rendition of what occurred: the meeting with the Chief Deputy was precipitated by Brown filing suit in federal court and occurred only after an in-chambers conference among the district judge and counsel for all parties in both cases concerning Brown's having filed an application for a temporary restraining order. See Mem. Opinion and Order of 9/26/78, p. 12, Appendix A-6.

[6] Copies of all eight (8) of the depositions taken in the consolidated cases, as well as the stipulation of facts, have been lodged with the Supreme Court Clerk's office contemporaneously with the filing of this petition. See Rule 21.1(k), Supreme Court Rules.

When a JPSO deputy discovers an illegally parked car, he first attempts to locate the driver within the immediate vicinity. If unsuccessful, the deputy issues a citation and radios JPSO headquarters, requesting that a tow truck be dispatched to remove and impound the ticketed vehicle. The JPSO does not own a fleet of tow trucks so former Sheriff Cronvich contracted, orally, to have the towing done by four private towing entities who operated in separate geographical areas assigned by the Sheriff. Because of limited space at the JPSO's own auto pound, the contract towers were required under this arrangement to store the vehicles on their business premises in the majority of instances. The towers were notified of the availability or non-availability of space at the JPSO pound at the time headquarters requested that a tow and impoundment occur. Arrangements for the collection, handling and disbursement of monies collected for towing and storage fees differed among the private contract towers and the JPSO's own impoundment yard. See Mem. Opinion and Order of 9/26/78, pp. 8-9, Appendix A-6.

The district court found that only "sporadic" efforts are made to afford vehicle owners notice of the towing and impoundment of their vehicle, and the content of this notice is limited to informing an owner of the fact of the tow, the vehicle's location and the possibility of securing its release through payment in cash of all accrued towing and storage charges. See Mem. Opinion and Order of 9/26/78, p. 7, Appendix A-6. Following the radio communication between the road deputy and headquarters, the radio room dispatcher at the JPSO attempts to contact the owner by telephone to inform him of the towing and impoundment of his vehicle, as well as its location. If a vehicle is being retained at the JPSO's own auto pound, a post card (see Appendix A-10) is mailed from JPSO

headquarters within 24 hours of the impoundment to the person identified as the registered owner by the state vehicle registration computer. The card asserts that the vehicle may be claimed by the owner by presenting ownership verification and payment of the towing and impoundment charges. No mention is made of there being an alternative to payment of the fees. Should the card be returned unclaimed, the JPSO writes the appropriate state office to request a copy of the vehicle's registration or title and, based on the information received, directs a certified letter to the registered owner containing the information and directives appearing on the post card with the further notification that failure to claim the vehicle within 60 days from the date of impoundment would necessitate disposal of the vehicle in "accordance with law" (see Appendix A-12). Significantly, neither the post card nor the letter notice are issued in the majority of the cases, i.e. where vehicles are impounded at the yards of the contract towers (as occurred with both Breath and Brown). If an owner of a towed vehicle calls the JPSO to report that it is missing, he is informed of the tow and impoundment and of the vehicle's location.

The deposition testimony of the contract towers who towed and impounded the Breath (Dale Esteves d/b/a Bayou Wreckers) and Brown (Donald Jaeger of Jaeger's, Inc.) vehicles and that of the deputy in charge of the JPSO's own auto pound (Charles J. Budenich) made it clear that vehicles would be surrendered to owners *only* upon pre-payment in cash of all accrued towing and storage charges and "bond" was not acceptable to redeem a vehicle.[7] Former Sheriff Cronvich set the fees to be charged by the contract towers for towing and storage, but

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[7] See, e.g., *Budenich* depos., pp. 15-17; *Esteves* depos., p. 7, p. 10; *Jaeger* depos., pp. 12-13 [fn. 6 supra].

neither he nor anyone else at the JPSO ever told the contract towers or the deputy in charge of the JPSO pound that there was any alternative to payment of the fees as a precondition to an owner obtaining release of his vehicle.

La.Rev.Stat.Ann. 32:392 (see Appendix A-12) is silent on both provision for notice of its contents and on post-seizure procedures to be used by those who tow and impound under its authority. Subsection (B) thereof, while couched in terms of a limitation on the judiciary's power to order the release of vehicles prior to the "full satisfaction of all penalties or charges assessed on account of the offense", allows an owner to recover his vehicle upon the execution of an "appearance bond" in the maximum amount of the penalties and charges. If such a bond was acceptable to the JPSO and contract towers, a disposition of the parking ticket favorable to the owner would (presumably) automatically free him of responsibility for the accrued towing and storage fees. Nonetheless, and as found by the district court and noted by the Fifth Circuit's panel dissent, the bond scheme contemplated by the statute had never been used in Jefferson Parish, and the Parish Judge to whom plaintiff directed his request for a refund after his parking ticket had been dismissed did not even know of the statute's existence (see Transcription of Proceedings in First Parish Court, p. 7, Appendix A-9) and no procedural mechanism with respect to the handling of bonds or refunds had ever been set up.

The district court found that the only alternatives to redeeming seized vehicles without the payment of accrued charges include a "thoroughly informal" appeal to the owner of the private towing company on the grounds of personal hardship, and either an "Internal Affairs Investigation" prompted by a claimant's complaint that the

road deputy made an error of judgment in the ticketing, or an "informal administrative hearing", prompted by a claimant's contention that the imposition of the charges is erroneous or unwarranted for some other reason. The Internal Affairs Investigation would be conducted by, and an administrative hearing held before, the JPSO's Chief Criminal Deputy, Richard M. Thompson. Although the owners of the private companies testified that they would honor, and have honored, requests from the JPSO to release certain vehicles without collection of accrued charges, testimony also established that neither these owners nor the head of the JPSO's own auto pound was aware of the availability of an "administrative hearing procedure" before Chief Deputy Thompson. See Mem. Opinion and Order of 9/26/78, pp. 9-10, Appendix A-6.

The district court found, and the Court of Appeals panel dissent recognized, that the towing and storage fees collected by the JPSO or by the contract towers are non-refundable. See Mem. Opinion and Order of 9/26/78, pp. 8-9, p. 20, Appendix A-6. In the trial court, defendants failed to prove that any of the aforedescribed "alternatives" to the payment of non-refundable fees had in fact ever been utilized. Significantly, neither the JPSO nor any of the contract towers had a procedure in effect whereby monies collected without bond (as in the case of Breath) could later be returned in the event of a successful defense of the parking violation charge or in the event of an erroneous assessment.

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ARGUMENT

The interests that car owners have in (1) access to and use of their towed and impounded vehicles and in (2) the fees collected therefor are sufficiently substantial to

invoke the protections of the Due Process Clause when their deprivation occurs under color of state law.[8] An automobile is a virtual necessity for most Americans, *Wooley v. Maynard*, 430 U.S. 705, 715, 97 S.Ct. 1428, 1435 (1977); *Lee v. Thornton*, 538 F.2d 27 (2nd Cir. 1976); *Guzman v. Western State Bank*, 516 F.2d 125, 132 n.8 (8th Cir. 1975); *Stypmann v. City & County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977) ("The private interest in the uninterrupted use of an automobile is substantial . . . a person's ability to make a living and his access to both the necessities and amenities of life may depend upon availability of an automobile when needed"), and vehicle ownership is thus a property interest within the scope of the Due Process Clause of the Fourteenth Amendment. Id. 557 F.2d at pp. 1342-43. Any deprivation of that interest must be accomplished in conformity with due process, see e.g., *Stypmann, supra* (5-day delay in justifying vehicle detention excessive); *Price v. City of Junction, Texas*, 711 F.2d 582 (5th Cir. 1983) (due process in a junked car ordinance setting; 10 days notice to abate violations or re-

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[8] Any argument that the private towers were not acting under "color of [state] law" is belied by the fact that each engaged in the challenged towing activity in geographic areas specifically allocated to them by Sheriff Cronvich, pursuant to a standing agreement with him. To the extent that these arrangements endowed the private towers with authority to perform what traditionally and ordinarily would be a public function of seizing private property under law, their contract was sufficiently colored with a governmental character to trigger the same constitutional limits as are imposed on the State. See e.g., *Goichman v. Rheuban Motors, Inc.*, 682 F.2d 1320, 1322 (9th Cir. 1982); *Tedeschi v. Blackwood*, 410 F.Supp. 34 (D. Conn. 1976); *Lugar v. Edmonson Oil Co., Inc.*, — U.S. —, 102 S.Ct. 2744, 2756-57 (1982); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1605 (1970); *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1157 (1966); *Evans v. Newton*, 382 U.S. 296-99, 86 S.Ct. 486-88 (1966); *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809 (1953); and *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276 (1946).

move vehicle and 10 days within which to request a hearing satisfy due process); *McKee v. Heggy,* 703 F.2d 479 (10th Cir. 1983) (due process violated by police selling abandoned vehicle without notice to owner); *Goichman v. Rheuban Motors, Inc., supra,* 682 F.2d 1320 (post-vehicle seizure hearing within 48 hours of request satisfies due process); *Sutton v. City of Milwaukee,* 672 F.2d 644 (7th Cir. 1982) (pre-tow notice and hearing not required); *Huemmer v. Mayor and City Council of Ocean City, Maryland,* 632 F.2d 371 (4th Cir. 1980) (towing ordinance constitutionally defective where recovery of removed vehicle absolutely conditioned on payment of towing and storage charges and no opportunity given for notice and hearing to establish whether removal was rightful); *Hale v. Tyree,* 491 F.Supp. 622 (ED Tenn., N.D. 1979) (ordinance requiring payment of towing and storage fees for towed vehicle's redemption without prior opportunity for a hearing violates Due Process Clause); *Gillam v. Landrieu,* 455 F. Supp. 1030 (ED La. 1978) (ordinance authorizing towing of vehicles found violating "any traffic law" overbroad; failure of city to notify car owner of *inter alia* the means of securing its release violates due process); *Craig v. Carson,* 449 F.Supp. 385 (MD Fla., Jacksonville Div. 1978) (city ordinances authorizing removal and retention of cars by sheriff's department, assessment and creation of lien for charges, foreclosure of lien by forfeiture with no effective notice and opportunity to contest retention and assessment of charges are unconstitutional); and *Remm v. Landrieu,* 418 F.Supp. 542 (ED La. 1976) (city towing and impoundment ordinance violative of due process where towing and storage fees assessed without prior notice or the opportunity for a hearing); and this point is recognized by the Court of Appeals in its decision sought to be

reviewed by this petition.[9] See also *Bell v. Burson,* 402 U.S. 535, 539, 91 S.Ct. 1586, 1589 (1971) (drivers' license may be essential in the pursuit of a livelihood and due process protections apply on revocation thereof). If a license may not be suspended without due process because it may indirectly deprive an individual of his means to make a living, a direct deprivation of this means, i.e. the automobile itself, should even less be tolerated. *Graff v. Nicholl,* 370 F.Supp. 974, 981 (N.D. Ill. 1974).

"Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . [it] is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 902 (1976). In determining the nature of the process which is "due", three distinct factors must be considered: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, and (3) the government's interest, including the function involved and the physical and administrative burdens that the additional or substitute procedural requirement would entail. Id. 424 U.S. at p. 335, 96 S.Ct. at p. 903. The hearing need not always take place before the deprivation of the interest. There are "extraordinary situations" that justify postponing notice and an opportunity for a hearing. *Fuentes v. Shevin,* 407 U.S. 67, 90, 92 S.Ct. 1983, 1999 (1972). Thus courts have countenanced a deprivation of property interests without opportunity for a prior hearing when: (1) the deprivation is

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[9] However, the cited decisions make it clear that the circuits are not in agreement on what process is "due" in a government-operated vehicle towing and impoundment setting.

directly necessary to secure an important government or general public interest, (2) there is a special need for very prompt action, and (3) the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Id. 407 U.S. at p. 91, 92 S.Ct. at p. 2000. But, generally, seizure of property without prior hearing has been sustained only where the owner is afforded a prompt post-seizure hearing at which the person seizing the property must at least make a showing of probable cause. See e.g., *Stypmann, supra,* and the cases cited at 557 F.2d 1338, 1344 fn. 20.

Petitioners acknowledge that towing and impoundment procedures may lawfully be used to effectuate the State's police power as long as appropriate due process protections are prevalent.[10] The Court of Appeals upheld the JPSO's notice procedures, relying primarily on the fact

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[10] Part III-A of the Fifth Circuit panel majority opinion, 729 F.2d at p. 1010, Appendix A-1, says that Breath and Brown argued that the challenged practices violated their rights to due process by failing to provide pre-tow notice and a hearing, but that misses the point they sought to make. Plaintiffs maintained in the district court that not every alleged violation of parking regulations presented an "extraordinary situation" justifying the towing of the vehicle; that, in many instances, the parking ticket would be sufficient to protect the State's interests. The district court held that Breath and Brown did not have standing to present this argument, however, and this holding was not challenged on appeal. The "waiver" referred to in the majority opinion notwithstanding, Breath's point was this: the justification for alleviating respondents of the burden of pre-tow notice and hearing is the existence of adequate post-seizure procedures. Thus, if the post-seizure procedures are inadequate, then the tow itself (a "taking") would be unlawful. Breath asserts this position to be reasonable and justified, see *Fuentes v. Shevin, supra,* and *Stypmann, supra,* as well as distinguishable from any rigid, unrealistic argument that pre-tow notice and hearing are required without consideration of the procedures which follow.

that a vehicle owner was told of the tow and place of impoundment if he called to report his vehicle missing, and ruled that the statutory bond scheme when combined with the hearing on the merits of the parking ticket, afforded adequate due process protection. The Court of Appeals rejected the district court's holding that the JPSO bears responsibility for informing vehicle owners of the options available for recovery of their vehicles and of the avenues of redress for potentially erroneous assessments, holding additionally that "each citizen is presumed to know the law" and thus notice to the public of the bond scheme statute is constructively given by its enactment and publication.

Mullane v. Centra' Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, (1950), and its progeny are the guiding light for questions related to due process notice. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id. at p. 314, 70 S.Ct. at p. 657. The Court held that published notice of a judicial settlement constituted insufficient notice to those beneficiaries of a common trust fund who could easily be reached by mail. Notice by publication was inadequate "not because in fact it fails to reach everyone, but because . . . it is not reasonably calculated to reach those who would easily be informed by other means at hand." Id. at p. 319, 70 S.Ct. at p. 660. See also *Memphis Light, Gas & Water Div. v. Craft, supra*, 436 U.S. at pp. 13-15, 98 S.Ct. at pp. 1562-1563 (1978) (notice and hearing requirements in a municipal utility service termination setting) and *Mennonite Board of Missions v. Adams*, 462 U.S. —, 103 S.Ct. 2706

(1983) (notice by mail or other means as certain to insure actual notice is the minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable).

There are two areas of notification that Breath contends are lacking in the challenged practices and related state statute: notice of the tow and impoundment and notice of available alternatives to payment of the towing and storage charges. In sanctioning telephone notice of the tow and impoundment by the JPSO, the Court of Appeals panel majority noted that the JPSO radio room dispatcher attempts to contact the vehicle owner by phone and "in some cases" post cards and registered letters are sent to the registered owner to inform him of the tow, but primarily relied on the fact that in those instances where the car owner calls to report his car missing, he is informed of the tow and of the location of his vehicle. The Court of Appeals decision ignored the district court finding that the JPSO gave only "sporadic" notice, that no records were kept regarding actual contact with a vehicle owner by telephone and that no follow-up written notice occurs when a vehicle is impounded by the contract towers.

Breath respectfully asserts that telephone notice in a government-operated vehicle towing and impoundment setting is not constitutionally sufficient because it is not "reasonably calculated to reach those who would easily be informed by other means at hand" in that *inter alia* it would not reach non-resident vehicle owners or those owners who have no telephone or who happen to be away from home at the time the call was made, nor would vehicle owners be notified who had unlisted numbers. It was

made clear in the trial court that registered vehicle owners' names and addresses are readily available to the JPSO through the state's vehicle registration (computer) system and thus requiring that written notice be given to the owners of all impounded vehicles whether in the JPSO pound or, as in the majority of instances, in the yards of the contract towers is not an overburdensome requirement. That written follow-up notice is in fact given when vehicles are impounded at the JPSO's own auto pound demonstrates the reasonableness of Breath's argument that such notice should likewise occur when the contract towers' yards are used for impoundment.

In *Mennonite Board of Missions v. Adams, supra,* 462 U.S. —, 103 S.Ct. at p. 2712, the Supreme Court held that a mortgagee possesses a substantial property interest that is significantly affected by a tax sale and is entitled to notice reasonably calculated to apprise him of a pending tax sale. The Court went on to hold that if a mortgagee is entitled to actual notice of the tax sale, then *a fortiori* a mortgagor, for whom there exists more than just a substantial property interest, is entitled to actual notice. Of particular interest here is the Court's explanation that:

> Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax sale proceedings are therefore likely to be initiated. In the first place, a mortgage need not involve a complex commercial transaction among knowledgable parties, and it may well be the least sophisticated creditor whose security interest is threatened by a tax sale. More importantly, a party's ability to take steps to safeguard its interest does not relieve the State of its constitutional obligation. It is true that particularly extensive efforts to provide notice may often be required when the State is aware of a party's inexperience or

> incompetence. See, e.g. *Memphis Light, Gas & Water Div. v. Craft, supra,* 436 U.S. at 13-15, 98 S.Ct. at 1562-64; *Covey v. Somers, supra* [351 U.S. 141, 146-147, 76 S.Ct. 724, 727 (1956)]. But it does not follow that the State may forego even the relatively modest administrative burden of providing notice by mail to parties who are particularly resourceful. . . . Notice by mail or other means as certain to insure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. (Emphasis in original; some citations and full text omitted)

The second issue of notice in this case pertains to the Court of Appeals' holding that respondents bear no responsibility for informing vehicle owners of available alternatives to the prepayment of the towing and storage fees, including the bond scheme of §392(B), assuming that the scheme offers a constitutionally acceptable alternative to the payment of the charges.[11] Is should be noted that the non-refundable nature of the fees required to be paid by an owner to redeem his vehicle does not dovetail with the JPSO procedures and related statute found to pass constitutional muster by the Court of Appeals. A vehicle owner may be innocent of the charge that he has violated a traffic regulation and a finding of innocence should carry with it the discharge of any responsibility for the fees associated with the towing, impoundment and storage operation. The error in the assessment of the charges would presumably then be corrected. However, the relationship between an owner's innocence of the parking infraction and freedom from responsibility for the already-assessed towing charges is ignored under the JPSO practices and statutory scheme when the bonding procedure

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[11] See "Questions Presented for Review", *infra*, #2.

(as was the case with Breath) is not used. Monies collected from owners as a precondition to a vehicle's release without bond, as pointed out by the district court and the Court of Appeals panel dissent, are non-refundable. The permanent deprivation of the owner's property which he has exchanged for the continued use of his vehicle is accomplished without *any* hearing on his responsibility to the State. Thus due process is violated. See e.g., *Gillam v. Landrieu, supra,* 455 at p. 1042 (ED La. 1978) (no justification for city's failure to accept bond in lieu of fees for vehicle immobilization).

The district court found that the non-refundable charges are imposed indiscriminately on owner-claimants in the vast majority of instances (see Mem. Opinion and Order of 9/26/78, p. 22, Appendix A-6). Neither the JPSO nor the contract towers inquire into the owner's participation, whether actual or imputed, in the alleged illegal parking of vehicles later impounded. Even assuming that an administrative hearing before Chief Deputy Thompson is a possible means to early recognition of a meritorious claim of non-liability, the efficacy of this procedure is undermined by the failure of the JPSO to apprise interested parties of this alternative. Additionally, although a "court or committing magistrate" possesses authority under section 392(B) to require an appearance bond in an amount less than the total of the towing and storage costs and the penalties attached to the parking violation charge, he is not given authority to waive the bond requirement or any guidelines to follow in considering a mitigation of the amount due. And, again, owners are given no notice of this purported alternate method of securing the release of their vehicles. Thus it is clear that the risk of erroneous deprivation under the current scheme, whatever that percentage figure might be, is firmly built into the system. Id. at p. 22.

To be acceptable as an alternative procedural safeguard under the Due Process Clause, a "bond" procedure should be accessible and attractive to all. There should be a provision allowing for the deposit of property other than money to serve as "in lieu" security for the towing and storage charges allegedly due.[12] Additionally, the procedures to be followed by owners in obtaining release of their vehicles by posting such security should not be more burdensome than the nature of the remedy demands. The costs which the JPSO or State might incur in instituting this procedure, both in terms of time and money, would be minimal. As emphasized by the district court and the Court of Appeals panel dissent, owners are given no notice whatsoever of this "alternate" method of securing the release of their vehicles. To the contrary, the deposition testimony of the contract towers and the deputy in charge of the JPSO auto pound shows that vehicle owners are actually told that "bond" is not acceptable and that there is in fact *no* alternative to the prepayment in cash of all accrued charges in order that an impounded vehicle be released. [fn. 6 supra].

The bond procedure set out in §392(B) does not truly seek to minimize the risk of erroneous assessments or accommodate the interests of an owner-claimant. Respondents have asserted it to be an alternative to the payment

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12 Examples of non-money forms of bonds are contained in *Remm v. Landrieu, supra,* 418 F.Supp. at p. 544 (cash, check, money order, drivers' license or American Automobile Association card) and LSA-R.S. 32:411, as amended (deposit of drivers' license in lieu of security upon arrest). It should be noted that the district court rejected the Governor's contention that a drivers' license is embraced within the term "appearance bond" as used in LSA-R.S. 15:88, holding that "[a] chauffeur's or operator's license does not fit into the various forms which an appearance bond may take under section 15:88". See Mem. Opinion and Order of 9/26/78, p. 9, Appendix A-6.

of assessed towing and storage charge, but even if a bond was acceptable to the JPSO and contract towers it would require the surrender of other valuable property in exchange for the vehicle. Thus the substitute financial burden it imposes places this bonding 'alternative' beyond the reach of many claimants and reduces its attractiveness to others. It also exposes car owners to the prepayment of not only towing and storage charges but penalties as well (prior to a finding of guilt).[13] Furthermore, the obscurity of the procedures to be followed in obtaining an "appearance bond" under the statutory scheme would no doubt discourage even the most eager claimant from use. Thus, under the challenged system, no real accommodations are made to the substantial private interests involved.

Petitioners contend that due process requires respondents to inform vehicle owners of the statutory bonding "alternative". The Supreme Court has held that there can be no artificial barrier between the notice and hearing components of the constitutional guarantee of due process. *Memphis Light, Gas & Water Div. v. Craft, supra,* 436 U.S. at p. 16, 98 S.Ct. at p. 1563 n.15. This principle defeats the Court of Appeals holding that respondents bear no responsibility for informing owners of the bond scheme of §392(B). The Supreme Court should review this case and require that measures be taken to insure that all those whose vehicles have been towed and impounded are informed of the options available to them for recovery of their vehicles and of the avenues of redress

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[13] Once a vehicle has been towed from its allegedly offending location, the seizure is no longer necessary " . . . to secure an important governmental or general public interest", *Fuentes v. Shevin, supra,* 407 U.S. at p. 90, 92 S.Ct. at p. 1999, the only state interest then at stake being the collection of the towing and storage fees from those found guilty of traffic violations. See *Remm v. Landrieu, supra,* 418 F.Supp. pp. 545-46.

for potentially erroneous assessments. This group, of course, includes those vehicle owners who appear to reclaim their vehicles before enough time has passed for notification by mail (as occurred with Breath). Local and state governments should not be authorized, as the Court of Appeals would have it, to rely on the existence of a statutory bond scheme as an alternative to the payment of towing and storage charges particularly where (as here) government employees and their agents (contractees) misrepresent or conceal the statute's existence from vehicle owners and/or refuse to apply the law.

In *Memphis Light, Gas & Water Div. v. Craft, supra,* notice was given to utility customers that if they did not pay their bills their service would be cut off. The Supreme Court held this notice to be an unconstitutional deprivation of due process because it did not tell the customers of their right to present objections to their bills. 436 U.S. at pp. 13-15, 98 S.Ct. at pp. 1562-63. Breath contends that it is not enough to rely upon "each citizen is presumed to know the law" when the person whose car is impounded is actually told by the JPSO or those who carry out the towing operation on its behalf that while he can later challenge the parking ticket in court he cannot have his car back unless he pays non-refundable fees when actually there is an alternative of which the citizen is kept in ignorance. The merit of this contention becomes all the more apparent when it is demonstrated, as the record of this case abundantly shows, that law enforcement officials and even judges did not know of the existence of the law or that they concealed its existence. It becomes unconstitutional, as well as unconscionable, for a government to act oppressively against its citizens by leading them to believe that there is no other recourse under the law. This is precisely what happened to Breath and Brown when they went to

the contract towers' impoundment yards to redeem their vehicles.

An enactment that relies on the presumption of knowledge must evidence some rational accommodation between the interests of the State and fairness to those against whom the law is applied. *Vlandis v. Kline,* 412 U.S. 441, 93 S.Ct. 2230 (1973). And the constitution puts even our most cherished legal maxims and presumptions to the test of fairness and rationality in light of common experience: ". . . in passing on the constitutionality of a state law, its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted." *North Laramie Land Co. v. Hoffman,* 268 U.S. 276, 283, 45 S.Ct. 491, 494 (1925).

In holding that car owners are presumed to know of the statutory bond "alternative" to prepayment of towing and impoundments fees, the Fifth Circuit panel majority chose to rely on *Texaco Inc. v. Short,* 454 U.S. 516, 102 S.Ct. 781 (1982) ("To afford notice, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply."). But that case is distinguishable because there the mineral interest owners whose claims had lapsed because they did not know of the law requiring them to file a statement of claim in the local county recorder's office prior to 20 years of non-use were not faced with government officials or their agents misleading or concealing from them the rights or options which were available.

In the vehicle towing and impoundment operation under challenge in this case, government officials and their agents had an *active* role in preventing vehicle owners from exercising the bonding alternative to prepayment of towing and storage charges. The Supreme Court has rec-

ognized circumstances in which a State's reliance on the 'presumed to know the law' maxim is not consistent with the restrictions imposed by the constitution on legislative action, *Lambert v. California,* 355 U.S. 225, 78 S.Ct. 240 (1957), and such a circumstance is surely here considering the acts of misrepresentation or concealment engaged in by JPSO personnel and the contract towers.[14]

The customers of the city utility in *Craft* were not compelled to "know the law" as to their right to challenge the utility bills and the Supreme Court held it to be a violation of procedural due process for the utility not to tell them of this right under the law. The same result should occur here: it should not be presumed that Breath, Brown and the citizens of Jefferson Parish knew of the statutory

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[14] The Fifth Circuit panel majority opinion, 729 F.2d at p. 1012 n. 4, Appendix A-1 recognized that the record does contain evidence concerning misrepresentation by the contract towers of the availability of the appearance bond procedure, but noted that the district court granted summary judgment motions dismissing the towing companies and that no appeal was taken. Breath points out, however, that the panel majority failed to note the deposition testimony given by Charles J. Budenich, the JPSO deputy in charge of the JPSO auto pound at all times material hereto, who denied knowing of any alternative to the payment in cash or (certified check) of all accrued towing and storage charges in order for a vehicle to be released. Budenich pointedly testified that "bond" was not acceptable to redeem an impounded vehicle. See *Budenich* depos., pp. 15-17. Petitioners had no cause to appeal from the judgments dismissing the contract towers in view of the district court's holding that "it is only through the Sheriff's Office that these companies tow and impound vehicles, Mem. Opinion and Order of 4/6/77, at pp. 16-17, Appendix A-8, and that the companies acted at the behest and under the aegis of the JPSO. Mem. Opinion and Order of 7/21/77, p. 7, Appendix A-7. See *Huemmer, supra,* 632 F.2d at p. 372 (private towing operator could not be held liable for violation of automobile owner's civil rights because of his towing of owner's vehicle from private property pursuant to defective city ordinance where tower had no occasion to doubt the validity of the regularly adopted ordinance, which ordinance had not previously been called into question).

bond scheme when their own officials and their agents misled or concealed its existence from them and/or refused to apply the law. Even if the statutory towing, impoundment and bond schemes of §392 are facially constitutional, their application in the case at bar falls far short of the mark. The actions by or attributable to respondents in misleading or concealing the existence of the bonding 'alternative' from vehicle owners should not in all fairness be allowed to stand as comporting with the Due Process Clause.

The Court of Appeals held that the appearance bond procedure in §392(B), along with the hearing on the merits of the parking ticket, provides post-seizure protections sufficient to satisfy the standards of due process.[15] But the parking violation trial afforded Breath cannot seriously be said to have comported with due process for two principal reasons: firstly, the "hearing" occurred on May 6, 1977, 8½ months following the ticketing, towing and impoundment of his vehicle[16] and thus not close enough in time to the "taking" to comport with the *Fuentes* test for seizures allowed without prior notice and hearing and, secondly, because there was no congruity between the interests asserted by Breath and the interests at issue in the trial. Breath's guilt or innocence of the alleged park-

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[15] Because of this holding the Court of Appeals did not reach and discuss other 'alternatives', as suggested by respondents, by which a vehicle owner can purportedly redeem a towed car without paying towing fees. Petitioners, however, hasten to point out that these suggestions were rejected by the district court in its Mem. Opinion and Order of 9/26/78, at p. 10, ("Internal Affairs Investigation and "informal administrative hearing") and at p. 20 (filing suit), Appendix A-6.

[16] Under the challenged procedures, the parking violation trial could not possibly occur until after arraignment is had which, by stipulation, varies from 7 to 30 days subsequent to the ticket being issued. See Stipulation of Facts, No. 29(f) [fn. 6 *infra*].

ing infraction was certainly at issue, but not the interests he had in (1) access to and use of his towed and impounded vehicle and in (2) the towing fee he was required to pay in order that his vehicle be released.

The Fourteenth Amendment prohibits a state from "finally destroy[ing] a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148 (1982). *Logan* concerned a discharged, handicapped employee's loss of his right to pursue a discriminatory termination. The Supreme Court held that the independent tort action available under state law was a constitutionally unsatisfactory substitute for his cause of action under the state Fair Employment Practices Act because reinstatement was not a remedy available through the tort action. ". . . Even if successful it [would] not vindicate entirely Logan's right to be free from discriminatory treatment." 102 S.Ct. at p. 1158.

A critical pre-requisite to a determination that existing post-seizure remedies are sufficient to satisfy the requirements of due process is an ascertainment of congruity between the substantive interests asserted by the plaintiff and the interests protected by the existing remedial scheme. Remedies not responsive to the range of intangible interests claimed to be injured are not meaningful in an analysis of the adequacy of the process provided. See *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1982), where a state prisoner brought suit under 42 USCA §1983 because the prison mail room had negligently lost his hobby kit. The state provided an action for tortious losses at the hands of the state, and the Supreme Court declared that because "[t]he remedies provided could have fully compensated respondent for the property loss he suffered . . . they were sufficient to satisfy the requirements of due process." 451

U.S. at p. 544, 101 S.Ct. at p. 1917. See also *Rutherford v. United States,* 702 F.2d 580 (5th Cir. 1983) (administrative proceedings to recover overassessed taxes did not satisfy due process with respect to taxpayers' claims of harrassment and alleged violation of liberty interests).

In sum, *Parratt* and *Logan* make it clear that a proper application of their principles demands analysis of the adequacy of the available process to remedy the essential aspects of the interests at stake. The post-seizure hearing requirement cannot be satisfied by the parking ticket trial made available to Breath: he succeeded in being exonerated from the parking violation itself, but was unable to challenge the towing and impoundment of his pickup truck or to obtain judicial relief toward refund of the towing fee he was required to pay. To pass constitutional muster, the parking violation trial should encompass the full range of interests actually at stake, not just guilt or innocence of the alleged parking infraction, and should occur at a time close in proximity to the vehicle seizure.

CONCLUSION

What happened to Breath, it is respectfully asserted, should be actionable under 42 USCA §1983 as violative of the Due Process Clause: his vehicle was towed and impounded at the behest of the JPSO and pursuant to an arrangement and procedures established by the Sheriff. Through his own efforts he learned from the JPSO that his pickup truck had been towed, as well as its whereabouts. On attempting to secure release of his vehicle, he was told that there was no alternative to his paying the towing fee in cash (which he did). 8½ months later he was exoner- upon the citations of authority previously given, Breath obtain a refund of the towing fee he had been required

to pay because no procedure or mechanism had ever been set up to return these monies or, for that matter, to handle the bonds contemplated by §392(B). He was never afforded an opportunity (hearing) wherein he could challenge the seizure of his vehicle and that he was required to pay a non-refundable towing fee in order that it be released.

For the above reasons, along with those reasons and upon the citations of authority previously given, Breath and the class of persons he represents herein respectfully assert that the Court of Appeals decision involves resolution of important federal questions of nationwide significance in a manner that conflicts with the Supreme Court's decisions in a number of cited cases and that the circuits are in conflict over what process is 'due' in a government-operated vehicle towing and impoundment setting. Accordingly, petitioners respectfully request that a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to precipitate review of its decision be issued.

Respectfully submitted
on behalf of petitioners,

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APPENDIX

A-1 Opinion of the United States Court of Appeals for the Fifth Circuit (April 16, 1984)

A-2 Opinion on Rehearing by the United States Court of Appeals for the Fifth Circuit (June 14, 1984)

A-3 Amended Judgment of the District Court (July 7, 1983)

A-4 Judgment of the District Court (January 6, 1983)

A-5 Minute Entry by the District Court (September 19, 1978)

A-6 Memorandum Opinion and Order of the District Court (September 26, 1978)

A-7 Memorandum Opinion and Order by the District Court (July 21, 1977)

A-8 Memorandum Opinion and Order by the District Court (April 6, 1978)

A-9 Transcription of proceedings in the First Parish Court for the Parish of Jefferson (May 6, 1977)

A-10 The post card to be mailed as a result of an impoundment in the JPSO auto pound

A-11 The letter to be mailed in case the post card is returned unclaimed

A-12 Verbatim text of constitutional provisions and statutes

A-1

Gerard O. BREATH, Individually d/b/a The Roach Coach, and on behalf of all others similarly situated, Plaintiff-Appellee Cross-Appellant,

v.

Alwynn J. CRONVICH, (former) Sheriff of Jefferson Parish, and Harry Lee, Sheriff of Jefferson Parish, Defendants-Appellants Cross-Appellees.

Lloyd BROWN, Individually and on behalf of all others similarly situated, Plaintiff-Appellee,

v.

Alwynn J. CRONVICH, (former) Sheriff of Jefferson Parish, and Harry Lee, Sheriff of Jefferson Parish, Defendants-Appellants.

Gerard O. BREATH, Individually d/b/a The Roach Coach, and on behalf of all others similarly situated, Plaintiff-Appellee Cross-Appellant,

v.

Alwynn J. CRONVICH, (former) Sheriff of Jefferson Parish, et al., Defendants-Appellants Cross-Appellees,

and

Edwin W. Edwards, Governor of Louisiana, Defendant-Appellant Cross-Appellee.

Lloyd BROWN, individually and on behalf of all others similarly situated, Plaintiff-Appellee,

v.

Alwynn J. CRONVICH, (former) Sheriff of Jefferson Parish, et al., Defendants-Appellants,

and

Edwin W. Edwards, Governor of Louisiana,
Defendant-Appellant.

Nos. 83-3035, 83-3438.

United States Court of Appeals, Fifth Circuit.

April 16, 1984.

Class action was brought challenging practices in Jefferson Parish, Louisiana of towing and impounding illegally parked vehicles and assessing towing and storage fees before the vehicles are released to their owners. The United States District Court for the Eastern District of Louisiana, Edward J. Boyle, Sr., J., found the challenged practices and relevant statutes unconstitutional, and cross appeals were taken. The Court of Appeals, Gee, Circuit Judge, held that: (1) prior notice and hearing is not required to tow illegally parked cars; (2) appearance bond procedure, combined with hearing on merits on parking ticket, afforded adequate due process protection; (3) publication of statutory procedures for filing of appearance bond and hearing is sufficient notice of their availability; and (4) practice of sheriff's office of notifying owners that their vehicles have been towed satisfied due process.

Reversed.

Jerre S. Williams, Circuit Judge, filed dissenting opinion.

1. Constitutional Law 251.6

Fundamental requirement of due process is an opportunity to be heard at a meaningful time and in a meaningful manner. U.S.C.A. Const.Amends. 5, 14.

2. Constitutional Law 251.6

In determining the type of due process hearing required the court must consider three distinct factors, namely, the private interest that will be affected by the official action, the risk of an erroneous deprivation of such interest to the procedures used and their probable value, if any, of additional or substitute procedural safeguards, and the government's interest, including the function involved and the fiscal administrative burdens that the additional or substitute procedural requirements would entail. U.S.C.A. Const.Amends. 5, 14.

3. Constitutional Law 278(1.1)

A due process hearing need not always take place before the deprivation. U.S.C.A. Const.Amends. 5, 14.

4. Constitutional Law 278(1.1)

Due process clause countenances deprivation of property interests without opportunity for a prior hearing when the deprivation is directly necessary to secure an important government or general public interest, there is a special need for very prompt action and the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. U.S.C.A. Const.Amends. 5, 14.

5. Constitutional Law 292

Due process does not require notice and hearing prior to towing an illegally parked car. LSA-R.S. 32:143, subd. A, 32:392; U.S.C.A. Const.Amends. 5, 14.

6. Automobiles 363

When an illegally parked car is towed or impounded, some form of fair and impartial hearing at which an owner is provided an opportunity to challenge the lawfulness of removing the car and assessing charges against him must be provided within a reasonable time. LSA-R.S. 32:143, subd. A, 32:392; U.S.C.A. Const.Amends. 5, 14.

7. Constitutional Law 292

Procedure whereby owner of a vehicle which has been towed or impounded as being illegally parked can redeem the car without paying any fees by obtaining an appearance bond, combined with hearing on merits of the parking ticket provides a postseizure hearing sufficient to comport with due process. LSA-R.S. 32:143, subd. A, 32:392; U.S. C.A. Const. Amends. 5, 14.

8. Constitutional Law 251.6

An elementary and fundamental requirement of due process is notice reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. U.S.C.A. Const.Amends. 5, 14.

9. Constitutional Law 251.6

For due process purpose, notice is constructively given by publication of a statute and persons owning property within state are charged with knowledge of relevant statutory provisions affecting the control or disposition of that property. U.S.C.A. Const.Amends. 5, 14.

10. Constitutional Law 292

Publication of statutory procedure for posting appearance bond to obtain release of a towed or impounded vehicle, along with statutory procedure for contesting the parking ticket, is sufficient due process notice and sheriff's office is not otherwise required to inform vehicle owners that such procedure is available. LSA-R.S. 32:143, subd. A, 32:392; U.S.C.A. Const.Amends. 5, 14.

11. Constitutional Law 292

Notice afforded by sheriff's office to vehicle owner that vehicle has been towed satisfies due process where following impoundment radio room dispatcher attempts to telephone the owner and in some cases postcards and registered letters are sent to the registered owner and when owner calls to report his vehicle missing he is informed of the tow. LSA-R.S. 32:143, subd. A, 32:392; U.S.C.A. Const.Amends. 5, 14.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before BROWN, GEE and WILLIAMS, Circuit Judges:

GEE, Circuit Judge:

This suit revolves around the practice in Jefferson Parish of towing and impounding illegally-parked vehicles and assessing towing and storage fees before the vehicles are released to their owners. Plaintiff Breath filed suit seeking individual and classwide injunctive and declaratory relief, indivdual restitution and damages, and costs

and attorneys' fees for a class of persons who had paid non-refundable towing and impoundment fees. Several weeks later, plaintiff Brown filed suit seeking similar relief. These suits were consolidated.

The district court found that the challenged vehicle and towing practices, as well as those provisions of La. Rev.Stat.Ann. 32:392 (West Supp. 1984) which relate to the seizure and retention ow unoccupied vehicles found in violation of La.Rev.Stat.Ann. 32:143(A) (West 1963), were unconstitutional in failing to provide procedural due process. In several later orders, the district court awarded damages, costs and attorneys' fees to plaintiffs and distributed the award among the three defendants: (1) ex-Sheriff Cronvich of the Jefferson Parish Sheriff's Office (JPSO), sued in his individual capacity; (2) Sheriff Lee, sued in his official capacity; and (3) the Governor of Louisiana also sued in his official capacity. Defendants appeal, contending that the statutes and JPSO practices are constitutional, that Sheriff Cronvich is entitled to qualified immunity, and that the award of attorneys' fees wastoo large. Plaintiffs cross-appeal, maintaining that the fee award is too small. We find the statutes and JPSO practices constitutional and, accordingly, reverse.

I.

On August 20, 1976, a JPSO officer responded to a complaint by a Jefferson Parish resident that a truck parked near an intersection allegedly blocked the view of those who wished to cross the intersection. This truck was owned by Breath. The officer cited Breath under § 143(A) for "parking in an intersection causing an obstruction of view," and had the truck towed and impounded. Later the same day, Breath called the JPSO to

report his truck stolen and was informed of the ticketing, towing and location of his truck. He obtained its release the same day, upon verification of ownership and payment of a $20 towing charge. In proceedings held before the First Parish Court for the Parish of Jefferson, Breath's motion to quash the ticket was granted because of a discrepancy between the particular violation charged on the ticket and information contained in the Bill of Particulars. The court refused, however, to grant his request for a return of the $20 towing fee, indicating that no mechanism was in existence to secure its return.

On July 17, 1976, Brown reported to the New Orleans Police Department that his car, which he had purchased a few days earlier, had been stolen. The vehicle was discovered that day blocking a residential driveway in Jefferson Parish. Because the vehicle registration records still showed the owner of the vehicle to be Joseph Banks, Brown's predecessor in title, Brown was not informed that his vehicle had been found until September 13. When he appeared at the towing yard to pick up his vehicle, he was told that his car had been discovered illegally parked and that he could recover it only by paying the accrued towing and storage charges of $120. Brown met with JPSO Chief Deputy Thompson who, upon hearing the facts of the case, arranged for Brown's car to be released without payment of the charges.

II.

Brown and Breath argue that the statutory scheme under which their cars were towed, as well as the JPSO practices enforcing that scheme, violated their right to procedural due process. La.Rev.Stat.Ann. 32:392 provide

that a police officer may tow or detain any vehicle found in violation of La.Rev.Stat.Ann. 32:143(A).[1]

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1. La.Rev.Stat.Ann. 32:143(A) provides:

> No person shall stand, or park a vehicle except when necessary to avoid conflict with other traffic, or in compliance with law or the directions of a police officer or traffic control device, in any of the following places:
>
> (1) On a sidewalk;
>
> (2) In front of a public or private driveway;
>
> (3) Within an intersection;
>
> (4) Within fifteen feet of a hydrant;
>
> (5) On a cross walk;
>
> (6) Within twenty feet of a cross walk at an intersection;
>
> (7) Within twenty feet upon the approach to any flashing beacon stop sign, or traffic control signal located at the side of a roadway;
>
> (8) Between a safety zone and the adjacent curb, or within twenty feet of points on the curb immediately opposite the ends of a safety zone;
>
> (9) Within fifty feet of the nearest rail of a railroad crossing;
>
> (10) Within twenty feet of the driveway entrance to any fire station, and on the side of a street opposite the entrance to any fire station within seventy-five feet of said entrance, when properly posted;
>
> (11) Alongside or opposite any street excavation or obstruction when stopping, standing, or parking would obstruct traffic;
>
> (12) On the roadway side of any vehicle stopped or parked at the edge or curb of a street;
>
> (13) Upon any bridge or other elevated structure upon a highway or within a highway tunnel;
>
> (14) At any place where official signs prohibit such;
>
> (15) Any place where parking will obscure or obstruct visibility of any traffic control device.

When a JPSO deputy discovers an illegally parked car subject to towing under § 392, he first attempts to locate the driver within the immediate vicinity. If unsuccessful, the deputy then issues a citation and radios JPSO headquarters, requesting that a tow truck be dispatched to remove and impound the ticketed vehicle. The tow truck then tows the vehicle to the JPSO pound or to a private pound, depending upon availability.

Once the car is impounded, the JPSO radio room dispatcher attempts to telephone the owner to inform him of the towing and of the location of his car. If the car is impounded in the JPSO yard, a post card or registered letter is sent to the registered owner of the car informing him of the tow. If the car is at a private yard, no such notice is sent. Naturally, if an owner reports to the police that his car is missing, he is informed of the tow.

A motor vehicle towed and impounded for illegal parking will be released to the owner upon payment of the costs incurred in towing and storing the vehicle. If the owner intends to contest the parking violation, he can obtain release of his car *without* paying the towing and storage fees by obtaining an appearance bond from a magistrate under La.Rev.Stat.Ann. 32:392(B) (West Supp. 1984). An owner can also redeem his vehicle without paying the fees by informally complaining to JPSO that the deputy erred in ticketing, or by appealing to the owner of one of the private towing companies that to pay the fee would be a hardship. If an owner pays the towing and storage fees, he cannot obtain a refund even if he prevails on the traffic violation charge.

III.

[1, 2] Plaintiffs maintain that this towing and impoundment scheme deprives them of property without due process. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). In determining the type of hearing required, we must consider three distinct factors: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Id.* at 335, 96 S.Ct. at 903.

[3, 4] The hearing need not always take place before the deprivation of the interest. There are "extraordinary situations" that justify postponing notice and an opportunity for a hearing. *Fuentes v. Shevin,* 407 U.S. 67, 90, 92 S.Ct. 1983, 1999, 32 L.Ed.2d 556 (1972). Thus, courts have contenanced deprivation of property interests without opportunity for a prior hearing when: (1) the deprivation is directly necessary to secure an important government or general public interests, (2) there is a special need for very prompt action, and (3) the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. *Id.* at 91, 92 S.Ct. at 2000.

A. Plaintiffs argue that § 392 violates their right to due process by failing to provide a hearing *prior* to the

time cars are towed. While conceding that in some emergency situations police could tow cars without a prior hearing, plaintiffs maintain that not every violation of § 143(A) presents an emergency situation justifying the seizure of a violating, unoccupied vehicle without prior notice and a hearing. Plaintiffs, however, specifically waived the right to make this argument in their briefs.[2]

[5] Were we to reach this issue, however, it is clear that prior notice and hearing is not required to tow illegally parked cars. *Sutton v. City of Milwaukee,* 672 F.2d 644, 646 (7th Cir. 1982); *Remm v. Landrieu,* 418 F.Supp. 542, 545 (E.D.La. 1976). The three *Fuentes* requirements for postponed notice and hearing are satisfied. First, the towing is necessary to protect the interest of local governments in regulating the use of their streets and other public places. Second, public convenience and safety normally require the prompt removal of illegally parked vehicles. Third, a police officer must make some determination that the statute is being violated before the vehicle can be towed. *Remm,* 418 F.Supp. at 545. Thus, the lack of prior notice and hearing does not demonstrate a lack of procedural due process.

[6] B. Plaintiffs additionally argue that they were not afforded an adequate post-towing hearing and that this violates their right to due process. When a car is towed or impounded, some form of fair and impartial hearing at which an owner is provided an opportunity to challenge the lawfulness of removing his car and assessing charges against him must be provided within a reasonable

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2. Breath states in his brief that he does not argue this point on appeal. Brief of Plaintiff Breath at 20 n. 6. Brown incorporates Breath's brief into his own. Brief of Plaintiff Brown at 7.

time period. *Huemmer v. Mayor & City Council of Ocean City,* 632 F.2d 371, 372 (4th Cir. 1980); *Stypmann v. City and County of San Francisco,* 557 F.2d 1338, 1343-44 (9th Cir. 1977); *Craig v. Carson,* 449 F.Supp. 385, 395 (M.D. Fla. 1978).

If the car owner chooses to contest the parking ticket, he will be granted a hearing on the merits of the violation. While waiting for the hearing to be scheduled, the owner can redeem his car without paying any fees by obtaining an appearance bond:

> The court or committing magistrate having jurisdiction over an offense involving a vehicle shall not order or allow the release of the vehicle prior to the full satisfaction of all penalties or charges assessed on account of the offense except upon the execution of an appearance bond in the maximum amount of such penalties and charges, with good and solvent surety approved by the court or committing magistrate.

La.Rev.Stat.Ann. 32:392(B) (West Supp. 1984). The term "appearance bond" is defined as:

> every bail bond, recognizance or other obligation, or deposit of cash, checks, negotiable bonds or money orders made or taken to secure the appearance of any person before any court; but in all cases where cash, checks, negotiable securities or money orders have been deposited in lieu of bond with a surety, in case of discharge or forfeiture, the same shall be disposed of as otherwise provided by law.

La.Rev.Stat.Ann. 15:88 (West 1981). Thus, by obtaining an appearance bond, a person can have possession of his car until a hearing on the merits of the traffic ticket is held.

[7] This bond procedure, combined with the hearing on the merits of the ticket, affords adequate due process

protection. The procedure protects the government's interest in retaining security for the owner's payment of towing and storage fees, and also protects the vehicle owner's interest in the uninterrupted use of his automobile. Indeed, several cases suggest that similar bond procedures would provide due process protection to car owners whose vehicles have been impounded. *See Stypmann*, 557 F.2d at 1343; *Hale v. Tyree*, 491 F.Supp. 622, 626 (E.D.Tenn. 1979); *Craig*, 449 F.Supp. at 395; *Remm*, 418 F.Supp. at 545-46. Consequently, we hold that the appearance bond procedure in § 392(B), along with the hearing on the merits of the parking ticket, provides a post-seizure hearing sufficient to comport with the standards of due process.[3]

C. Plaintiffs also contend that even if the appearance bond procedure, combined with the hearing on the merits, is an adequate hearing for due process purposes, defendants must inform vehicle owners that such a procedure is available.

[8, 9] An elementary and fundamental requirement of due process is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 13, 98 S.Ct. 1554, 1562, 56 L.Ed.2d 30 (1978). Notice is constructively given, however, by the publication of a statute. Persons owning property within a state are charged with knowledge of

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3. Defendants suggest several other ways in which a vehicle owner can redeem a towed car without paying towing fees. See part II, *supra*. Because we find that the appearance bond procedure is adequate to protect due process rights, we need not discuss these alternative methods.

relevant statutory provisions affecting the control or disposition of that property. *Texaco, Inc. v. Short,* 454 U.S. 516, 532, 102 S.Ct. 781, 793, 70 L.Ed.2d 738 (1982); *Anderson National Bank v. Luckett,* 321 U.S. 233, 243, 64 S.Ct. 599, 604, 88 L.Ed. 692 (1944); *North Laramie Land Co. v. Hoffman,* 268 U.S. 276, 283, 45 S.Ct. 491, 494, 69 L.Ed. 953 (1925); *National Acceptance Co. v. Zusmann,* 379 F.2d 351 (5th Cir.), *cert. denied,* 389 U.S. 975, 88 S.Ct. 478, 19 L. Ed.2d 469 (1967). To afford notice, a legislature "need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Texaco,* 454 U.S. at 531-32, 102 S.Ct. at 793. Indeed, the Louisiana Civil Code specifically states: "[a]fter the promulgation, no one can allege ignorance of the law." La.Civ.Code Ann. art. 7 (West 1952).[4]

[10] The *Texaco* case is analogous to our own. In *Texaco,* the Indiana Legislature enacted a statute providing that that a severed mineral interest that is not used for 20 years automatically lapses and reverts to the current surface owner of the property unless the mineral owner files a statement of claim in the local county recorder's office. As in the instant case, the conduct of the mineral owner is purely passive—failing to file a statement of claim. Nevertheless, the Supreme Court held that the State of Indiana was not obligated to notify the mineral owners of the new law. Publication of the statute

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4. The record does contain evidence that employees of the private towing companies misrepresented the availability of the appearance bond procedure to plaintiffs. However, the district court granted summary judgment motions dismissing the towing companies from this suit, and these have not been appealed.

constituted sufficient notice. Similarly, the State of Louisiana is not required to notify owners of towed cars of the availability of the appearance bond procedure. It is a state statute and car owners are deemed to have been notified of it.[5]

[11] D. Finally, plaintiffs argue that neither § 392 nor JPSO practices comport with procedural due process by adequately notifying owners that their cars have been towed. We hold that the notice given by the JPSO is reasonably calculated under all the circumstances to apprise interested parties that their cars have been towed. Here, the JPSO radio room dispatcher attempts to contact the owner by phone. In some cases, post cards and registered letters are sent to the registered owner to inform him of the tow. Most important, when the car owner calls to report his vehicle missing, he is informed of the tow. This notice is sufficient.

IV.

Section 392 of the Louisiana Revised Statutes and the JPSO practices that enforce it do not deny due process to the owners of towed vehicles. Consequently, we need not reach the issues of qualified immunity, attor-

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5. *Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957), does not control the disposition of this case. In *Lambert*, the Supreme Court held that a municipal ordinance making it unlawful for any convicted person to remain in the city for more than five days was unconstitutional in failing to provide notice of prohibited conduct. The *Lambert* court noted that the defendant's conduct was wholly passive and would not alert him to the consequences of his deed. *Id.* at 228, 78 S.Ct. at 242. *Lambert's* application, however, has been limited to criminal cases; it only concerns "the mens rea that is necessary before the State may convict an individual of crime." *Texaco*, 454 U.S. at 537 n. 33, 102 S.Ct. at 796.

neys' fees, and damages. The judgment of the trial court is

REVERSED.

JERRE S. WILLIAMS, Circuit Judge, dissenting:

My disagreement with the opinion of the Court is found in one narrow but very critical aspect of the holding. That has to do with the asserted availability of an appearance bond procedure under which the owner of an impounded car can get it back without paying towing and storage charges. The Court's opinion accurately reports that there is a provision in La.Rev.Stat.Ann. 32:392(B), under which an appearance bond can be executed. I reluctantly agree that this procedure is constitutional under the facts of this case. The procedure could be unconstitutional in a case where high charges had been built up and an owner had no way of knowing his car had been impounded. The procedure is suspect as to fundamental fairness since it provides only for a bond which is in the maximum amount of all possible penalties and charges.

The problem in this case is that under the findings of the district court, unchallenged in this Court, this appearance bond procedure had *never* been used in Jefferson Parish, that at least one judge of the First Parish Court in Jefferson Parish did not know of its existence, that no procedures with respect to handling such a bond have ever been set up. The record also makes clear that the victims of the impoundments were never informed of the alternative of an appearance bond. And once the towing and storage charges have been paid, there is no procedure of any kind under which they can be returned even if the charges are later dropped or the owner is acquitted.

The reliance of the Court is upon the established cliche that "everyone is presumed to know the law." But when judges and law enforcement officials do not know of the existence of the law or conceal the existence of it, it becomes unconstitutional for the government to act oppressively against citizens by leading them to believe that there is no such recourse under the law. And that is exactly what happened in this case.

There must come a point at which in constitutional fairness to its citizens those in charge of the enforcement of the laws have to deal fairly with citizens and not mislead them as to their rights.

This case is controlled by the principles of *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S.1, 14, 98 S.Ct. 1554, 1562, 56 L.Ed.2d 30 (1978). In that case notice was given utility customers that if they did not pay their bills their service would be cut off. The Supreme Court held this notice an unconstitutional deprivation of due process of law because it did not tell the customers of their right to present objections to their bills.

It is not enough to rely upon "each citizen is presumed to know the law" when the person whose car is impounded is told that while he can later challenge the parking ticket in court he cannot have his car back unless he pays the non-refundable fees when actually there is an alternative of which the citizen is kept in ignorance. That is a violation of due process, and the *Craft* case tells us so. The customers of the utility in *Craft* were not compelled to "know the law" as to their right to challenge the utility bills. It was a violation of due process not to tell them of their right under the law. So also in this case. Hence this dissent.

A-2

Gerard O. BREATH, Individually d/b/a The Roach Coach, and on behalf of all others similarly situated, Plaintiff-Appellee Cross-Appellant,

v.

Alwynn J. CRONVICH, (former) Sheriff of Jefferson Parish and Harry Lee, Sheriff of Jefferson Parish, Defendents-Appellants Cross-Appellees,

Lloyd BROWN, Individually and on behalf of all others similarly situated, Plaintiff-Appellee,

v.

Alwynn J. CRONVICH, (former) Sheriff of Jefferson Parish and Harry Lee, Sheriff of Jefferson Parish, Defendants-Appellants.

Gerard O. BREATH, Individually d/b/a The Roach Coach, and on behalf of all others similarly situated, Plaintiff-Appellee Cross-Appellant,

v.

Alwyn J. CRONVICH, Former Sheriff of Jefferson Parish, et al., Defendants-Appellee Cross-Appellees,

and

Edwin W. Edwards, Governor of Louisiana, Defendant-Appellant Cross-Appellee.

Lloyd BROWN, Individually and on behalf of all others similarly situated, Plaintiff-Appellee,

v.

Alwynn J. CRONVICH, Former Sheriff of Jefferson Parish, et al., Defendants-Appellants,

and

Edwin W. Edwards, Governor of Louisiana, Defendant-Appellant.

Nos. 83-3035, 83-3438

United States Court of Appeals,
Fifth Circuit

June 14, 1984

Class action was brought callenging practices of towing and impounding illegally parked vehicles. The United States District Court for the Eastern District of Louisiana, Edward J. Boyle, Sr., J., found the challenged practices and relevant statutes unconstitutional. The Court of Appeals reversed, 729 F.2d 1006. On motion for rehearing, the Court held that where it was apparent that damages awarded resulted from District Court's finding of liability under 1871 civil rights statute and not as result of pendent state law claims, and state law issues had not been reached, Court of Appeals on petition for rehearing would remand case so that District Court might decide whether to consider state law claims.

Opinion amended to remand, and judgment otherwise affirmed.

Federal Courts 939

Where it was apparent that damages awarded resulted from district court's finding of liability under 1871 civil rights statute and not as result of pendent state law claims, and state law issues had not been reached, Court of Appeals on petition for rehearing after reversing, would remand case so that district court might decide whether to consider state law claims. 42 U.S.C.A. § 1983; F.R.A.P.Rule 35, 28 U.S.C.A.; U.S.Ct. of App. 5th Cir. Rule 35, 28 U.S.C.A.

Appeals from the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 4/16/84, 5 Cir., 1984, 729 F.2d 1006)

Before BROWN, GEE and WILLIAMS, Circuit Judges.

PER CURIAM:

On petition for rehearing, Breath argues that we failed to consider the trial court's award of special damages under state law for damage caused to his vehicle as a result of the tow. While it is correct that the district court awarded Breath $190.50 for repairs to his vehicle, $20 for the towing and impairment (sic) fee, and $1000 for "upset, distress and considerable inconvenience," these damages resulted from the trial court's finding of § 1983 liability and not as a result of the pendent state claims. It is clear from the district court's opinion that the state law issues were never reached.

Consequently, our opinion is amended to REMAND the case so that the district court may decide whether to consider the state law claims. In all other respects, our judgment is AFFIRMED.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

A-3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action
No. 76-3123
Section: EJB

GERARD O. BREATH, ETC.

VERSUS

ALWYNN J. CRONVICH, ETC., ET AL

Civil Action
No. 76-3355
Section: EJB

LLOYD BROWN, ETC.

VERSUS

ALWYNN J. CRONVICH, ETC., ET AL

CONSOLIDATED

(Filed July 7, 9:56 A.M., 1983)

AMENDED JUDGMENT

The Motion of the defendant, Governor David C. Treen, to correct the judgments, entered herein, on January 6, 1983 considered and it appearing that said judgments do not reflect the relief to which the Court found in its Memorandum Opinion, dated September 25, 1978, the plaintiffs were entitled;

IT IS ORDERED that the aforesaid judgments entered on January 6, 1983 in these consolidated cases be amended to read as follows:

Considering the memorandum opinions and order on file herein and dated September 25, 1978 and December 28, 1982;

IT IS ORDERED, ADJUDGED, AND DECREED that the provisions of Louisiana Revised Statute 32:393 which relate to the seizure and retention of unoccupied vehicles found in violation of Louisiana Revised Statute 32:143 are unconstitutional;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the practices of the Jefferson Parish Sheriff's Office implementing Louisiana Revised Statute 32:392 and complained of in these consolidated matters, namely, (1) the collection of money or other valuable property from automobile owners as a precondition to release of vehicles towed and impounded pursuant to Louisiana Revised Statute 32:392; (2) the mailing of notices only to the registered owners of vehicles impounded in the Jefferson Parish Sheriff's Office yard, but not to the registered owners of vehicles impounded in privately owned yards; and (3) in the absence of a meaningful bond procedure, the failure of the Jefferson Parish Sheriff's Office to provide a hearing immediately after seizure of a vehicle to determine whether there is probable cause for its continued retention, are all unconstitutional. The Jefferson Parish Sheriff's Office is permanently enjoined from engaging in the above described practices.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of plaintiff, Gerard O. Breath, and against:

a) the defendant, Alwynn J. Cronwich, individually, for the following amounts, to wit:

$6,237.50 for attorney's fees, and $1,000.00 for damages for violation of civil rights of plaintiff, Gerard O. Breath, totaling $7,237.50, with interest from judgment until paid and for costs.

b) the defendant, Harry Lee, in his official capacity as Sheriff of the Parish of Jefferson, State of Louisiana, for the following amounts, to wit:

$2,037.50 for attorney's fees, and $210.50 for special damages, totaling $2,248.00, with interest from judgment until paid and for costs.

c) the defendant, David C. Treen, in his official capacity as Governor of the State of Louisiana, for the amount of $1,587.50 for attorney's fees, with interest from judgment until paid and for costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that there be judgment in favor of defendants, Alwynn J. Cronvich, Harry Lee and David C. Treen, and against the plaintiff, Gerard O. Breath, dismissing his claim for expert witness fee.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that there be judgment in favor of defendants, Harry Lee and David C. Treen, and against the plaintiff, Gerard O. Breath, dismissing his claim for damages for violation of civil rights, with costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that there be judgment in favor of plaintiff Lloyd Brown, and against:

a) the defendant, Alwynn J. Cronvich, individually, for the amount of $1,200.00 for attorney's fees, with interest from judgment until paid and for costs.

b) the defendant, David C. Treen, in his official capacity as Governor of the State of Louisiana, for

the amount of $560.00 for attorney's fees, with interest from date of judgment until paid and for costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that there be judgment in favor of defendants, Alwynn J. Cronvich, Harry Lee and David C. Treen, and against, the plaintiff, Lloyd Brown, dismissing his claim for special damages and for damages for violations of his civil rights, with costs.

New Orleans, Louisiana, this 7th day of July, 1983.

/s/ EDWARD J. BOYLE, SR.
Senior U. S. District Judge

ROBERT HEARIN
RICHARD GOINS
RICHARD MICHALCZYK
DANIEL MARTINY
PATRICIA N. BOWERS

A-4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action
No. 76-3123
Section "EJB"

GERARD O. BREATH, ETC.
VS
ALWYNN J. CRONVICH, ETC., ET AL

JUDGMENT

(Filed January 6, 1983)

Considering the memorandum opinion and order on file herein, and the direction of the Court as to the entry of judgment, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED, that there be judgment in favor of plaintiff, Gerard O. Breath, and against:

a) the defendant, Alwynn J. Cronvich, individually, for the following amounts, to wit:

$6,237.50 for attorney's fees, and $1,000.00 for damages for violation of civil rights of plaintiff, Gerard O. Breath, totaling $7,237.50, with interest from judgment until paid and for costs.

b) the defendant, Harry Lee, in his official capacity as Sheriff of the Parish of Jefferson, State of Louisiana, for the following amounts, to wit:

$2,037.50 for attorney's fees, and $210.50 for special damages, totaling $2,248.00, with interest from judgment until paid and for costs.

c) the defendant, David C. Treen, in his official capacity as Governor of the State of Louisiana, for

the amount of, $1,587.50 for attorney's fees, with interest from judgment until paid and for costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that there be judgment in favor of defendants, Alwynn J. Cronvich, Harry Lee and David S. Treen, and against the plaintiff, Gerard O. Breath, dismissing his claim for expert witness fee.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that there be judgment in favor of defendants, Harry Lee and David C. Treen, and against the plaintiff, Gerard O. Breath, dismissing his claim for damages for violation of civil rights, with costs.

New Orleans, Louisiana, this 6th day of January, 1983.

/s/ NELSON B. JONES, Clerk

APPROVED AS TO FORM:

/s/ EDWARD J. BOYLE, SR.
United States District Judge

A-5

No. 76-3123
Civil Action
Section D

GERARD O. BREATH, ETC.

VERSUS

ALWYNN J. CRONVICH, ETC., ET AL

No. 76-3355
Civil Action
Section D

Consolidated

LLOYD BROWN, ETC.

VERSUS

ALWYNN J. CRONVICH, ETC., ET AL

MINUTE ENTRY

(Filed September 19, 1978)

BOYLE, J.

A status conference was held today.

Present: Robert M. Hearin, Jr., Esq.
For Plaintiff Gerard O. Breath

Richard A. Goins, Esq.
For Plaintiff Lloyd Brown

Richard Michalczyk, Esq.
For Defendant Alwynn J. Cronvich

Ronald C. Davis, Esq.
For Defendant Edwin W. Edwards

Counsel for the parties were advised that the court has concluded that Louisiana Revised Statute 32:392 is

unconstitutional and that the practices of the Jefferson Parish Sheriff's Office with respect to the towing, impoundment, and release of unoccupied vehicles found in violation of Louisiana Revised Statute 32:143 in the unincorporated areas of Jefferson Parish, which practices have been challenged in this litigation, should be enjoined. Considering the assurances given the court by counsel for the defendant Cronvich that such practices had been discontinued upon the filing of C.A. NO. 76-3123 and that the Sheriff would voluntarily refrain from pursuing or allowing such practices in the future, the court determined, with the consent of the parties, that it would be unnecessary to issue the injunction and that the court would reserve its right to issue the injunction at any future date.

The court suggested, and counsel agreed, that it would be appropriate to proceed further by first disposing of the class certification issues with respect to the quantum aspect of this litigation, then the good faith defense, and finally the amount of recovery if the defense is not found valid.

The court and counsel expressed their understanding that Brown should proceed independently of the Breath case in any of the class aspects thereof.

Counsel for the plaintiff in Breath in due course will move to define and certify the class.

A-6

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

No. 76-3123
Civil Action
Section D

GERARD O. BREATH, ETC.

VERSUS

ALWYNN J. CRONVICH, ETC., ET AL

No. 76-3355
Civil Action
Section D

Consolidated

LLOYD BROWN, ETC.

VERSUS

ALWYNN J. CRONVICH, ETC., ET AL

MEMORANDUM OPINION AND ORDER

(Entered September 26, 1978)

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BOYLE, District Judge:

These consolidated actions place under the scrutiny of the Due Process Clause of the Fourteenth Amendment certain practices of the Jefferson Parish Sheriff's Office (JPSO) relating to the impoundment of unoccupied vehicles found within its jurisdiction, the unincorporated areas of the Parish, to be in apparent violation of the

parking regulations of section 143 of the Louisiana Highway Regulatory Act (LSA-R.S. 32:143). To the extent that the assertedly unlawful practices within these areas are authorized and governed by section 392 of the Act (LSA-R.S. 32:392)[1] the constitutional challenge is levelled against that statute as well.

Based on the alleged deprivation of due process guarantees *via* action taken under color of State law, the suits are brought pursuant to the Civil Rights Act of 1871 (42 U.S.C. § 1983) and the Federal Declaratory Judgment Act (28 U.S.C. §§ 2201, 2202) for an award of money damages in favor of the individual plaintiffs herein and for equitable relief in the form of restitution to the individual plaintiffs and the class they purport to represent, declaratory judgments decreeing the invalidity of the challenged State statute and JPSO practices, and an injunction prohibiting the continued enforcement and performance thereof. Jurisdiction is pleaded and exists under 28 U.S.C. §§ 1343(3) and (4). Further, both complaints contain the

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[1] The parties have assumed that LSA-R.S. 32:392 is to be evaluated as it appeared with amendments through 1976 and have quoted the statute revised through 1976 as the "subject state law." The Legislature amended section 392 in 1977 (see 1978 West Supp.). In its present form, it is divided into three paragraphs. A comparison of the statute as it appeared in 1976 and in its present form reveals that the changes effected by the 1977 amendment are not material to our consideration of these actions. The pertinent portions of the statute—those authorizing the impoundment of vehicles found in violation of LSA-R.S. 32:143 and providing for the court-ordered release of such vehicles under certain conditions—are contained in paragraphs (A) and (B) of section 392 as amended in 1977. We consider only those portions of paragraphs (A) and (B) to be the subject of plaintiffs' demands for declaratory judgments and relief under § 1983.

unelaborated statement that "the pendant jurisdiction of this Court is invoked."

The remaining defendants[2] in both actions are Alwynn J. Cronvich in his capacity as Sheriff of Jefferson Parish and Edwin W. Edwards, Governor of the State, who was substituted as a defendant for Attorney General William J. Guste, Jr.[3]

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[2] In both actions we granted several motions dismissing other original defendants as follows: members of the Jefferson Parish Council, *see* Record Doc. #36 in C.A. No. 76-3123 (the members were not made defendants in C.A. No. 76-3355); Jaeger's Inc., *see* Record Doc. #40 in C.A. No. 76-3123 and Record Doc. #35 in C.A. No. 76-3355; Joseph and Sidney Bourgeois, individually and d/b/a Sidney's Wrecker Service, Dale Esteves, d/b/a Bayou Wreckers, and Dale's Wrecker Service, *see* Record Doc. #60 in C.A. No. 76-3123 and Record Doc. #52 in C.A. No. 76-3355. Finding that the performance by the private companies of a traditionally parochial function under standing agreements with the Sheriff of Jefferson Parish constitutes action "under color of [State] law" so as to enable a § 1983 claim against them, we held that these defendants were entitled to assert the "good faith" defense, or qualified governmental immunity, which shields executive officials from monetary liability in such actions. *See* Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). Based on documentary evidence appearing in the record and the applicable law, we concluded that the private companies satisfied both the subjective and objective criteria of the good faith defenses they asserted and, accordingly, dismiss[ed] the plaintiff's claims for awards of money damages against them. Further, disinclined to require the continued presence of these parties solely for the purpose of the equitable remedies sought, which are more properly pursued against other defendants, we dismissed the remaining claims of the plaintiffs in an exercise of our broad authority to fashion the equitable relief which may be found to be appropriate herein.

[3] According to a stipulation entered into by the parties, "the claim by the plaintiff against the State is solely limited to

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Gerard O. Breath, plaintiff in C.A. No. 76-3123, has sued individually and on behalf of a class of persons whom he purports to represent. Similarly, Lloyd Brown seeks to maintain C.A. No. 76-3355 as an individual and class action. Following severance of the constitutional and quantum issues in both actions,[4] we granted Brown's motion to consolidate his action with the Breath case.[5] For purposes of disposition of the constitutional issues and subject to any further orders of the Court, the *Breath* proceeding was certified as a class action under Rule 23(b) (2) of the Federal Rules of Civil Procedure, the class to be comprised of:

> All persons whose unoccupied motor vehicles have been or will be towed and impounded at the order of the Jefferson Parish Sheriff's Department as a result of parking law violations in the unincorporated areas of Jefferson Parish, Louisiana.[6]

Considering Brown's membership in the class so defined, we denied his motion for class certification of C.A. No. 76-3355.[7]

Subsequently, it was ordered that the constitutional issues be submitted for adjudication on depositions, stipulations, and memoranda.[8] Having considered all material submitted by the parties, the pertinent portions of the

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the issue as to the facial validity of the statutes under attack in the complaints." *See* Record Docs. #88 (Breath) and #75 (Brown).

4 *See* Record Docs. #65 (Breath and #55 (Brown).

5 *See* Record Doc. #55 (Brown).

6 *See* Record Docs. #66 (Breath) and #55 (Brown).

7 . . *See* Record Doc. #55 (Brown).

8 *See* Record Docs. ##68 and 4 (Breach and ##55 and 7 (Brown).

record, and the applicable law, we conclude for reasons stated below that the challenged practices and statute violate the Due Process Clause of the Fourteenth Amendment.

The stipulations of the parties and the deposition testimony which is supplemental thereto, together with pertinent provisions of Louisiana law, establish an outline of the practices engaged in by the JPSO relative to vehicles ticketed for violations of Louisiana Revised Statute 32:143[9] and impounded at the owners' or drivers' ex-

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[9] LSA-R.S. 32:143 provides:

A. No person shall stand, or park a vehicle, except when necessary to vaoid conflict with other traffic, or in compliance with law or the directions of a police officer or traffic control device, in any of the following places:

(1) On a sidewalk;

(2) In front of a public or private driveway;

(3) Wnthin an intersection;

(4) Within fifteen feet of a fire hydrant;

(5) On a cross walk;*

(6) Within twenty feet of a cross walk at an intersection;*

(7) Within twenty feet upon the approach to any flashing beacon stop sign, or traffic control signal located at the side of a roadway;

(8) Between a safety zone and the adjacent curb, or within twenty feet of points on the curb immediately opposite the ends of a safety zone;

(9) Within fifty feet of the nearest rail of a railroad crossing;

(10) Within twenty feet of the driveway entrance to any fire station, and on the side of a street opposite the entrance to any fire station within seventy-five feet of said entrance, when properly posted;

(Continued on next page)

pense pursuant to Louisiana Revised Statute 32:392(A).[10] These sources also delineate the measures available to the owners of such vehicles to secure their release and to test the validity of assessments made against the owners for towing and storage costs.

Upon discovery of an illegally parked vehicle, the investigating deputy attempts to locate the driver within

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(Continued from previous page)

(11) Alongside or opposite any street excavation or obstruction when stopping, standing, or parking would obstruct traffic;

(12) On a roadway side of any vehicle stopped or parked at the edge or curb of a street;

(13) Upon any bridge or other elevated structure upon a highway or within a highway tunnel;

(14) At any place where official signs prohibit such;

(15) Any place where parking will obscure or obstruct visibility of any traffic control device.

B. No person shall move a vehicle not lawfully under his control into any such prohibited area or away from a curb such a distance as is unlawful.

*LSA-R.S. 32:1(9), enacted in 1962 and reenacted and renumbered 32:1(13) by Acts 1977, No. 113 § 1, defines "cross-walk" to mean: "(a) That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or, in absence of curbs, from the edges of the traversable roadway" as well as "(b) Any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by lines or other markings on the surface."

[10] LSA-R.S. 32:392(A), as pertinent here, provides:

Upon discovery of any vehicle in any manner operated in violation of this Chapter [LSA-R.S. 32:1-32:399, the Louisiana Highway Regulatory Act], the vehicle may be impounded forthwith by any . . . peace officer . . . and . . . shall be detained . . . at the expense and responsibility of the owner or driver.

the immediate vicinity. If unsuccessful, the deputy issues a citation listing the parking regulation allegedly violated and containing a notice that the person charged must appear for arraignment in court on a specific date.[11] Immediately thereafter, the deputy obtains from JPSO headquarters by radio a registration check and an auto theft bureau (ATB) check from the State computer system in order to determine the name and address of the registered owner and whether or not the vehicle has been reported stolen. It is the practice of some deputies to make an additional attempt to locate the owner before a vehicle is towed by placing a call to the registered owner or visiting his residence if it is nearby. During the radio communication between the deputy and JPSO headquarters, the deputy requests that a tow truck be dispatched to the scene to remove and impound the ticketed vehicle.

The Parish does not own a fleet of tow trucks but has contracted orally to have the towing performed by various private companies. These companies work in separate

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[11] The parties have stipulated that available court dates are assigned by the First and Second Parish Courts "in accordance with Rules of Court which are disseminated to the Sheriff's Office." Preparation of a schedule of available court dates for use by the deputies involves, according to the stipulation, consideration of the following factors: time to notify the owner of the vehicle; time required by the JPSO in processing citations and for filing citations with the Clerk of Court; the Clerk of Court's time in handling the necessary paper work and coordination of date with the Judge's calendar and District Attorney's calendar; and, work load of Court Docket. It was stipulated further that "the time for arraignment ranges from seven to 30 days and that the trial is scheduled at some time thereafter within the discretion of the Judge."

geographical areas assigned by the Sheriff.[12] Because of the limited space at the auto pound annexed to JPSO headquarters on the East Bank, the contract towing companies are required under this arrangement to store the vehicles on their business premises in the majority of instances. The companies are notified of the availability or nonavailability of space at the JPSO pound at the time headquarters requests an individual tow.

Only sporadic efforts are made to afford the owners notice of the accomplished towing and impoundment of their vehicles, and the content of such notice is limited to informing an owner of the seizure, the vehicle's location, and the possibility of securing its release through payment of towing and accrued storage charges. Following the radio communication between the road deputy and JPSO headquarters, the radio room dispatcher at JPSO attempts to contact the owner by phone to inform him of the towing, impoundment, and location of his vehicle. If a vehicle is being retained at the JPSO pound, a post card is mailed from headquarters within twenty-four hours of the impoundment to the person identified as the registered owner by the state computer system. On the card, the following text appears below a description of the vehicle and the storage location:

> This vehicle may be claimed by owner by presenting proof of ownership & self-identification upon payment of towage fee plus One (1) dollar per day storage fee

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[12] Bayou Wreckers and Jaeger's Inc. operated in JPSO's jurisdiction on the East Bank of the Mississippi River. The services were performed on the West Bank by Dale's Wrecker Service and Sidney's Wrecker Service.

> for the first (5) days of impoundment and Three (3) dollars per day thereafter.
>
> If you no longer own this vehicle, please notify this office. . . .

Should the card be returned unclaimed, the JPSO writes the appropriate State office to request a copy of the vehicle's registration or title and, based on the information received, JPSO directs a certified letter to the registered owner containing the information and directives appearing on the post card with the further notification that failure to claim the vehicle within sixty days from impoundment will necessitate disposal of the vehicle in accordance with law. Neither the post card nor the letter notice is issued in cases where the vehicles are being held at one of the private towers' yards.

State law provides that a motor vehicle towed and impounded for illegal parking is to be released upon the owner's payment of costs incurred in the removal and storage of such vehicles as may be fixed by the local policing authority or municipality. *See* LSA-R.S. 32:472. Although section 472 is addressed solely to "municipalities," a category not embracing unincorporated areas, the JPSO and the private towers follow the procedure of surrendering vehicles to owners upon payment of towing and storage charges. According to the deposition testimony of Sheriff Cronvich, he authorized the private towers to charge a towing fee of $20 and a per diem storage fee of $2. *See* Cronvich Dep., at 8, 18, 22, Record Doc. #58, C.A. 76-3123. The contract towers operating on the East Bank collect the prescribed charges from the owners of the vehicles towed by them and stored in their yards. The money collected is kept by these companies as compensation for

their services, pursuant to contractual arrangements with the Sheriff. The JPSO collects such charges from the owners of vehicles which have been stored at the official pound following towing by the East Bank contract towers and reimburses them for the towing services performed. All towing and storage charges imposed on vehicles towed by the companies which operate on the West Bank, whether stored at the official pound or at the private yards, are collected from their owners by the JPSO. Following collection, the JPSO compensates the companies for their towing and, if appropriate, storage services. There is no State or Parish law directing the refund of these collected monies upon a disposition of the traffic violation charge favorable to vehicle owners. Nor does the JPSO engage in a practice of authorizing refunds in these circumstances.

Section 392(B) of the Louisiana Highway Regulatory Act, LSA-R.S. 32:392(B),[13] although couched in terms of a limitation on the power of the judiciary to order the release of such vehicles prior to the payment of assessed costs, allows a vehicle owner to recover his vehicle upon execution of an "appearance bond" in the maximum amount of the assessed charges plus the penalties provided for

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[13] LSA-R.S. 32:392(B) provides:

> A vehicle impounded for violations of this Chapter [with exceptions not pertinent here] shall be detained until released by any court or committing magistrate having jurisdiction over the offense. The court or committing magistrate having jurisdiction over an offense involving a vehicle shall not order or allow the release of the vehicle prior to the full satisfaction of all penalties or charges assessed on account of the offense, except upon the execution of an appearance bond in the maximum amount of such penalties and charges, with good and solvent surety approved by the court or committing magistrate.

the traffic violation. If the bonding procedure is utilized, a disposition of the charge listed in the citation favorable to the owner operates automatically to free him of responsibility for the towing and storage charges which may have accrued.[14]

Alternate methods of redeeming seized vehicles without the payment of assessed towing and storage charges, insofar as the methods suggested by the defendants are relevant to these actions,[15] include a thoroughly informal appeal to the owner of the private towing company on the grounds of personal hardship and either an "Internal Affairs Investigation," prompted by a claimant's complaint that the road deputy made an error of judgment in the ticketing, or an "informal administrative hearing," prompted by a claimant's contention that the imposition of the charges is erroneous or unwarranted for some other reason. The Internal Affairs Investigation would be conducted by and the administrative hearing would be held before JPSO's Chief Criminal Deputy Richard M. Thompson. Although the owners of the private companies testi-

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[15] We do not consider to be legally significant a claimant's right to obtain a court-ordered release on what the defendant Cronvich has characterized simply as "civil grounds."

[14] The Governor of the State argues that section 392(B) authorizes the court of committing magistrate to release a vehicle upon the claimant's posting of an "appearance bond or adequate surety, (drivers license)." To support his thesis that a license is embraced within the terms "appearance bond or adequate surety," the defendant offers only a reference to Louisiana Revised Statute 15:88, which defines "appearance bond." We reject this contention. A chauffeur's or operator's license does not fit into the various forms which an appearance bond may take under section 15:88.

fied that they would honor and have honored requests from the JPSO to release certain vehicles without collection of towing and storage charges, testimony has established that neither these owners nor the head of the JPSO pound was aware of the availability of an administrative hearing before Chief Deputy Thompson.

The factual setting of the Breath action is as follows. On August 20, 1976, an officer of the JPSO responded to a complaint by a Jefferson Parish resident regarding the placement of a truck near an intersection allegedly blocking the view of those who wished to cross the intersection. Believing the truck to be in violation of section 143 and constituting a hazard the driver at the adjacent apartment complexes. The deputy then radioed JPSO headquarters to request that a tow vehicle be dispatched. Registration and ATB checks revealed the owner's name and address and that the car had not been reported stolen. Considering that the owner's address was not in the general vicinity, the officer made no further attempt to locate the owner or notify him of the impending tow.

A citation was issued, nominally under section 143, for "parking on an intersection causing an obstruction of view." The vehicle was towed by Bayou Wreckers and impounded in that company's yard. Later the same day, Breath called the JPSO to report his car stolen and was informed of the ticketing, towing and location of his truck. Upon verification of ownership and payment of the towing charge of $20 to Bayou Wreckers, the towing company released the vehicle that day.

In proceedings held before the First Parish Court for the Parish of Jefferson on May 6, 1977, the court granted

Breath's motion to quash the Bill of Information.[16] At that time, a request for the return of the $20 towing fee, unsupported by the citation of legal authority which would authorize the court to order such a refund, was denied.

On July 17, 1976, the plaintiff Brown reported to the New Orleans Police Department that the vehicle which he had purchased a few days earlier had been stolen. The vehicle was discovered on July 17 blocking a residential driveway in the Parish. After arriving on the scene in response to a complaint, a JPSO deputy made an effort to locate the driver by talking to neighbors and others present. Dut to the close timing in the series of events including Brown's purchase, the theft, his report to the NOPD, and the discovery by the JPSO of the vehicle, the deputy's certification and ATB checks revealed the name of Brown's predecessor in title, Joseph Banks, as the registered owner, and did not reflect the theft report.

The vehicle was ticketed under section 143 and towed and impounded by Jaeger's Inc. The deputy attempted to inform Mr. Banks, by telephone, of the location of the vehicle, but was unsuccessful. Several months later, it was learned that Brown had purchased the vehicle. The New Orleans Police Department notified Brown, by letter dated September 13, 1976, that his vehicle had been recovered by the JPSO and could be redeemed at Jaeger's. Upon

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[16] A transcript of the proceedings attached to the plaintiffs' original memorandum as Appendix A (see Record Doc. #89 in C.A. No. 76-3123) indicates that Breath argued that the charge listed on the citation was not among the parking prohibitions of section 143. Noting the discrepancy between the charge set out in the ticket and the charge specified in the Bill of Particulars and Answer filed by the State, i.e., "parking on a sidewalk," the court granted the motion to quash.

appearing at Jaeger's Brown was informed that his vehicle had been discovered unattended and illegally parked and had been ticketed by the JPSO. Further, he was told that he could recover his car only upon payment of $120, which represented accrued towing and storage charges.

Following institution of his suit, Brown obtained a hearing before Chief Deputy Thompson. Upon verification of his ownership and the facts surrounding the theft of the vehicle, his car was released to him without payment of the towing and storage charges. The return occurred on October 30, 1976. Brown was not prosecuted for the parking violation.

Before turning to a consideration of the merits of the claims *sub judice,* it is necessary to identify the boundaries of this dispute. Although the most recent amended complaints of both individual plaintiffs contain averments of the unconstitutionality of "any Parish ordinance(s) and/or state laws . . . relied on by the defendants as authority for the challenged practices" citing "more particularly, Section 11 of the Code of Ordinances of the Parish of Jefferson . . . , subdivision 11-91C inclusive, and Sections 142, 392, 395, 471-76, 521 and 522 of Title 32 of the Louisiana Revised Statutes,"[17] the memoranda of the plaintiffs submitted in connection with the constitutional issues involved in this litigation and certain stipulations of the parties reveal that the plaintiffs now have fashioned a more limited challenge. In the introductory section of their original memorandum, the plaintiffs state: "the issue be-

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[17] See ¶ 14a of the Third Amended Complaint filed in Breath, Record Doc. #38, and ¶ 21 of the Amended Complaint in Brown, Record Doc. #15.

fore the Court now in the case at bar revolves solely around the Constitutional validity of the subject state law and the implementing practice thereunder in the unincorporated portions [of the Parish]." Of the statutes listed in the various amended and amending complaints, the memorandum quotes as the "subject state law" only Louisiana Revised Statute 32:392, in itse application to vehicles ticketed for violations of the no-parking regulations of section 143 of Title 32, and Louisiana Revised Statute 32:143, as incorporated in section 392(A). Corresponding to this enumeration is the stipulation of the parties that the Breath and Brown vehicles were ticketed for parking in violation of section 143 and towed pursuant to section 392. The memoranda contain no mention of the Parish ordinances. Additionally, we note that there is no evidence that official action was taken against the individual plaintiffs under any Parish ordinance.[18]

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[18] We add these observations in regard to the sections of Title 32 listed in the latest amended complaints but not now considered part of the "subject state law." Only section 476 specifically relates to vehicles "seized or otherwise held by a parochial authority" following violation of State no-parking laws. In providing for the sale of impounded vehicles remaining unclaimed for a period of six months, this section highlights the importance of adequate procedural protections closely timed to the governmental seizure of the vehicles. Similarly, sections 521 and 522 authorize and govern the sale of vehicles "stored, parked or left" in a commercial garage or public storage or parking lot and remaining unclaimed for three months. Although these latter sections apparently are concerned primarily with vehicles not considered to be under police seizure or detention, they have application "even though a peace officer may have authorized the vehicles to be pulled in and stored." LSA-R.S. 32:521(A). Section 142, empowers a police officer to move to a place of safety vehicles parked on the traveled portion of a highway or upon a bridge,

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The original memorandum of the plaintiffs also indicates, however, that the plaintiffs are attempting at the same time to broaden their challenge to embrace an attack on the constitutional validity of Louisiana Revised Statute 32:143.1. Section 143.1, cited for the first time in this litigation in the memorandum, is quoted as a "subject state law" with the contention that it is "pertinent here." However, as previously mentioned, the parties have stipulated that the Breath and Brown vehicles were ticketed for parking in violation of section 143 and towed pursuant to section 392. Moreover, in fact, neither individual plaintiff has been the subject of operation of section 143.1.[19] Accordingly, there is no present "case or contro-

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causeway or in a tunnel but does not envision impoundment. Section 472 authorizes the release of vehicles upon payment of towing and storage charges but is directed to "municipalities," the definition of which extends only to incorporated entities (see LSA R.S. 32:1(43) as amended through 1977). Section 473 enables "municipalities" to adopt ordinances imposing criminal penalties and towing and storage charges on those violating local laws. Section 471 defines terms not used in sections 392 or 143, the "subject state law." Sections 474 and 475 deal with abandoned vehicles, which according to the parties' stipulation are "processed" not by the JPSO but by the Parish's Roads & Bridges Department. Section 395 relates to agents of the secretary of the Department of Public Safety.

[19] Section 143.1(A), like section 143(A)(2), makes it unlawful to block a private driveway. However, unlike section 143(A), section 143.1 goes on to authorize a course of conduct which the law enforcement officer may follow upon discovery of such a vehicle. The options authorized do not include impoundment of the vehicle, the action taken against Brown's automobile, which was discovered in front of a residential driveway. Under section 143.1, the deputy may move the vehicle, by tow if necessary, to a "legally permissible position" or he may require the driver to move the vehicle to such a position. Also under this section, the towing charges may be

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versy" involving this statute and we are not required to evaluate its constitutional validity within the framework of the dispute now before us.[20]

Further, the plaintiffs contend that the first issue presented for adjudication in this litigation is whether or not section 392(A), in authorizing the impounding of vehicles found in violation of the various provisions of section 143, referentially specifies only emergency situations justifying the immediate removal of illegally parked vehicles without prior notice and hearing.[21] The sole argument advanced by plaintiffs in this regard relates to the

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paid to the chief law enforcement officer within twenty days after the ticket is issued, and, if not paid during this period, will be imposed on the vehicle's owner/operator only upon a conviction of the violation. The section does not envision continued police custody of a vehicle or its retention pending payment of towing charges.

[20] *See* O'Shea v. Littleton, 414 U.S. 488, 494-96, 94 S.Ct. 669, 675-76, 38 L.Ed.2d 674 (1974); Zwickler v. Koota, 389 U.S. 241, 244 n.3, 88 S.Ct. 391, 393 n.3, 19 L.Ed.2d 444 (1967); Pollard v. Cockrell, — F.2d —, No. 76-3907 (5 Cir., Aug. 23, 1978; Delta Book Distributors, Inc. v. Cronvich, 304 F.Supp. 662, 668 n.25 (E.D. La. 1969).

[21] Under Fuentes v. Shevin, 407 U.S. 67, 90-91, 92 S.Ct. 1983, 1999-2000, 32 L.Ed.2d 556 (1972), the "extraordinary situations" exception to the due process guarantees of pre-seizure notice and an opportunity to be heard is applicable if the following three requirements are satisfied:

1. The seizure must be directly necessary to secure an important governmental or general public interest.

2. There must be a special need for very prompt action.

3. The state must keep strict control over its monopoly of legitimate force: the person initiating the seizure must be a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

regulation contained in subsection (14) of section 143(A) which prohibits the parking of a vehicle "[a]t any place where official signs prohibit such." It is the contention of the plaintiffs that "[c]learly, not every violation [of LSA-R.S. 32:143(A)(14)] presents such an extraordinary and/or emergency situation justifying the seizure of a violating unoccupied vehicle without prior notice and a hearing."

However, neither the Breath nor the Brown vehicle was parked in violation of subsection (A)(14). Thus, neither Breath nor Brown possesses standing to challenge the constitutional validity of that subsection, as incorporated into section 392(A), either individually or on behalf of a class.[22] Further, although Breath and Brown originally were entitled to a judicial determination of the constitutional validity of those subsections of section 143(A) arguably applicable to the positioning of their vehicles,[23] the plaintiffs apparently have abandoned any claim that the circumstances surrounding the discovery of their vehicles did not justify the prompt police action taken.[24] It is our view, therefore, that the legality or illegality of the summary seizures of vehicles found in violation of the pro-

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[22] See n.20.

[23] The Brown vehicle was ticketed for violation of section 143(A) (2). Subsections (1), (5) and (6) of section 143(A) appear to be applicable to the Breath vehicle. See n.9.

[24] In addition to failing to address any argument to the possible hazards or obstructions presented by the locations of their vehicles when ticketed, the plaintiffs have stipulated that the JPSO deputies involved "acted in good faith, with just cause, under statutes they believed applicable."

visions of section 143 is not a part of the controversy now before us.[25]

The second—and viable—portion of the plaintiffs' attack challenges the adequacy of sections 392(A) and (B) and the practices engaged in by the JPSO in affording postponed due process to the individual plaintiffs and the members of the class which Breath represents. For purposes of asserting this claim, the plaintiffs have assumed[26] that the hazards and obstructions created by vehicles parked in violation of the various provisions of section 143 justify their removal from the streets of Jefferson Parish prior to notice and a hearing.

The due process protections of the Fourteenth Amendment extend to the temporary detention of plaintiffs' vehicles[27] and are no less applicable by virtue of the existence of recovery provisions whereby owners may exchange other valuable property for the release of their vehicles.[28] The actions alleged in this litigation to have resulted in a deprivation of such constitutional guarantees was taken under color of State law.[29]

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[25] We earlier held (see Record Doc. #35, Brown) that the *Fuentes* "extraordinary situations" exception are met when vehicles are removed and impounded for violations pertinent to the Breath and Brown vehicles.

[26] *See* ¶ 3, p. 8 of the plaintiffs' original memorandum, *supra*.

[27] *See* Stypmann v. City & Cty. of San Francisco, 557 F.2d 1338, 1342, 1342 nn. 8 and 9 *and cases cited therein* (9 Cir. 1977).

[28] *See* Fuentes v. Shevin, supra, 407 U.S. at 84-86, 92 S.Ct. at 1996-97.

[29] We earlier held (see Record Doc. #35, Brown) that the participation of the private towing companies in the challenged pactices constitutes state action for purposes of § 1983. *See* Stypmann v. City and Cty. of San Francisco, supra, at 1341-42; Tedeschi v. Blackwood, 410 F.Supp. 34, 41-42 (D. Conn. 1976) (three-judge court).

We turn, then, to the question of the constitutional validity of the challenged practices and statutes as gauged against the requirements of procedural due process.

The Due Process Clause of the Fourteenth Amendment guarantees that actions taken by state governments which operate to deprive persons of significant property interests will be accompanied by procedural fairness adequate to minimize the risk of erroneous dispossession and to protect substantive rights.[30]

Its fundamental dictates are straightforward: "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they enjoy that right they must first be notified. [citation] It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"[31] "Some kind of hearing is required at some time before a person is finally deprived of his property interest."[32] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and

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[30] Memphis Light, Gas & Water Div. v. Craft, — U.S. —, —, 98 S.Ct. 1554, 1560 (1978); Mathews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976); Fuentes v. Shevin, supra, 407 U.S. at 80-81, 92 S.Ct. at 1994; Mitchell v. W. T. Grant Co., 416 U.S. 600, 610, 94 S.Ct. 1895, 1901, 40 L.Ed.2d 406 (1974).

[31] Fuentes v. Shevin, supra, 407 U.S. at 80, 92 S.Ct. at 1994.

[32] Memphis Light, Gas & Water Div. v. Craft, supra, — U.S. —, 98 S.Ct. at 1563, *quoting* Wolff v. *McDonnell*, 418 U.S. 539, 557-58, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974).

afford them an opportunity to present their objections."[33] "The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing."[34]

Proceeding on plaintiffs' assumption that the summary seizure of vehicles ticketed for parking violations under section 143 is necessitated by the hazards and obstructions pesented, it is apparent that the risk of "erroneous deprivation" is postponed, as is the need for adequate notice and an opportunity to be heard, until after the vehicle is removed from their parking locations. The risk of error in deprivation, which, if not minimized by adequate postponed procedural protections, would render the initial seizure unlawful, comes into existence in the current scheme when towing and storage charges are assessed against the vehicles' owners and the vehicles are retained pending payment of such charges or the surrender of valuable property to otherwise "secure" the State's interest in the eventual fulfillment of the owners' supposed obligations. A vehicle owner may be innocent of the charge that he has violated a traffic regulation. That innocence carries with it the discharge of any responsibility for the costs incurred in the removal and storage operations.[35]

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[33] Memphis Light, Gas & Water Div. v. Craft, supra, — U.S. at —, 98 S.Ct. at 1562, *quoting* Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

[34] Memphis Light, Gas & Water Div. v. Craft, supra, — U.S. at —, 98 S.Ct. at 1563.

[35] See Stypmann v. City & Cty, of San Francisco, supra, at 1343, n.18.

It follows that, at least as to form, the broad hearing requirement of due process is satisfied when the bonding procedure set forth in section 392(B) is utilized. As we have pointed out, a finding of innocence at the trial ultimately held on the parking violation charge automatically frees a vehicle owner from responsibility for towing and storage costs. The error in the assessment of the charges is corrected. However, the relationship between a vehicle owner's innocence of the parking infraction and freedom from responsibility for assessed towing and storage charges is ignored under the statutory scheme and JPSO practices when the bonding procedure is not used. Monies collected from owners as preconditions to release without bond are, in all cases, non-refundable. The permanent deprivation of the owner's property which he has exchanged for the continued use of his vehicle is accomplished without any hearing on his responsibility to the State. In this regard, the statutory scheme and the JPSO practices are constitutionally infirm in failing to provide the basic requirements of due process—adequate notice and an opportunity to be heard.[36]

We reject the defendant Cronvich's argument that the hearing requirement is satisfied by the asserted availability of an adjudication of an innocent owner's claim to a refund under Louisiana Civil Code Article 21, the State's "equity article." Even assuming that a claimant could prevail under this codal article, the small amounts involved would not justify engagement of counsel. The delays and procedural obstacles predictable would fur-

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[36] *See Gillam v. Landrieu*, — F.Supp. —, No. 76-3762 at 23-24, Conclusions of Law, ¶ C(2) (E.D. La. August 9, 1978).

ther tend to discourage pursuit of such a claim. More importantly, neither the burden of proceeding nor the burden of proof may be placed on the owner-claimant of the property seized rather than the government.[37]

Our inquiry is not ended with this determination, however. Due process requires more than a post-deprivation hearing which, if combined with an owner's trial on the traffic citation charge, will occur at the very earliest a week following the seizure of his vehicle.[38] A statement of the flexible nature of due process and the considerations which are relevant to a determination of its specific mandates in individual situations is contained in *Mathews v. Eldridge,* supra.

> "[D]ue process, unlike some fixed legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." . . . "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." . . . More precisely, our prior decisions indicate that identifications of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action taken; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail.

424 U.S. at 333-35, 96 S.Ct. at 902-03 (citations omitted).

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[37] See Memphis Light, Gas & Water Div. v. Craft, supra, — U.S. at —, 98 S.Ct. at 1566; Stypmann v. City & Cty. of San Francisco, supra, at 1343-44 n.19 *and accompanying text.*

[38] See n.11.

In applying this balancing test, the vehicle owner's interest was described and evaluated correctly by the Ninth Circuit in *Stypmann v. City and Cty. of San Francisco,* supra at 1342-43:

> A private interest in the uninterrupted use of an automobile is substantial. A person's ability to make a living and his access to both the necessities and amenities of life may depend upon the availability of an automobile when needed.[39]

Apparently, no effort has been made by any party to these actions to develop statistics on the frequency of error in the conditioning of release of a vehicle upon the payment of towing and storage charges or the surrender of other valuable property under the challenged State law and JPSO practices. However, it is evident that the charges are imposed indiscriminately on owner-claimants in the vast majority of instances. Neither the JPSO collection officers nor the owners of private towing companies inquire into the owner's participation, actual or imputed, in the claimed illegal parking of the vehicles later impounded. Even assuming that an administrative hearing before Chief Deputy Thompson is a possible means to early recognition of a meritorious claim of non-liability, the efficacy of this procedure is undermined by the failure of the JPSO to apprise interested parties of this alternative. Additionally, although a "court or committing magistrate" possesses authority under section 392(B) to require an appearance bond in an amount less than the total of the towing and storage costs, and the penalties attached to the parking violation charge, he is not given

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[39] See n.27.

authority to waive the bond requirement or any guidelines to follow in considering a mitigation of the amount due. And, again, owners are given no notice of this available alternate method of securing the release of their vehicles. Thus it is clear that the risk of erroneous deprivation under the current scheme, whatever the percentage figure might be, is built firmly into the system.

Nor does the bond procedure set out in section 392(B) truly seek to minimize the risk or accommodate the interest of an owner-claimant. While providing an alternative to the payment of assessed towing and storage charges, it requires the surrender of other valuable property in exchange for the seized vehicles. Obviously, the substitute financial burden it imposes places this bonding alternative beyond the reach of some claimants and reduces its attractiveness to others. Additionally, it exposes the owners to the pre-payment of not only the towing and storage charges but penalties as well. Furthermore, the obscurity of the procedures to be followed in obtaining an appearance bond under section 392(B)[40] no doubt would discourage the most eager claimant from use. Thus, under the current system, no real accommodations are made to the substantial private interests involved.

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[40] In their initial memorandum, the plaintiffs argue that the "bond procedure is cumbersome [and] requires a personal appearance and pleadings in Court with possibly a lawyer required." In their reply memorandum, the plaintiffs contend that "the bond procedure has never been used on any previous occasion, is unbeknownist [sic] to at least one Judge of the First Parish Court in the Parish of Jefferson, . . . makes no mention of the paper-flow or other handling of the subject 'bond,' [and] is totally unspecific in nature." Defendant Cronvich has not attempted to counter these arguments. Governor Edwards offered only a reference to LSA-R.S. 15:88 (see n.14).

The plaintiffs contend that due process requires that an immediate hearing be held in the absence of a reasonable bond procedure. Their contention derives support from *Stypmann v. City & Cty. of San Francisco*, supra, and is, we feel, correct. In the absence of a meaningful and accessible "bond" procedure or other procedure of equal dignity and availability that might prevent or ameliorate a temporary but substantial deprivation of the use and enjoyment of a towed private vehicle, owner-claimants must be afforded an opportunity for an early post-seizure hearing at which the government must at least make a showing of probable cause.[41] The value of this procedural safeguard is stated in *Stypmann:*

> An early hearing . . . would provide vehicle owners the opportunity to test the factual basis of the tow and thus protect them against erroneous deprivation of the use of their vehicles.

Id. at 1344.

The timing of the hearing, a task to be left in the first instance to the State, is to be determined by striking a balance between the private and public interests involved.[42] However, avoidance of the administrative burden and expense in providing prompt post-seizure hearings, a relevant but not controlling factor,[43] is "not enough in these circumstances to warrant denying such a hearing."[44] The

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[41] Stypmann c. City & Cty. of San Francisco, supra, at 1344, 1344, n.20.

[42] *Id.* at 1344, 45, *citing* Fuentes v. Shevin, supra, 407 U.S. at 96-97, 92 S.Ct. at 2002.

[43] Mathews v. Eldridge, supra, 424 U.S. at 347-48, 96 S.Ct. at 909.

[44] Stypmann v. City & Cty. of San Francisco, supra, at 1344.

principal interest of the public, that of imposing the burden of towing and storage costs upon the party responsible for the underlying parking infraction, is not endangered by this added protection.

To be acceptable as an alternative procedural safeguard under the Due Process Clause, a "bond" procedure must be accessible and attractive to all. Accordingly, there must be a provision allowing for the deposit of property other than money to serve as "in lieu" security for the towing and storage charges allegedly due the government.[45] Additionally, the procedures to be followed by owners in obtaining a release of their vehicles by posting such security may not be more burdensome than the nature of the remedy demands.[46] The costs which the government might incur in instituting this procedure, both in terms of time and money, would be minimal. Again, the public's significant interest in holding guilty parties accountable for the expenses is not jeopardized by this procedure.

There can be no artificial barrier between the notice and hearing components of the constitutional guarantee of due process.[47] The notice requirement is as flexible and as demanding as the hearing requirement, calling for such procedural protections as the particular situation de-

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[45] Examples of non-money forms of bonds are contained in Remm v. Landrieu, 418 F.Supp. 542, 544 (E.D. La. 1976) and LSA-R.S. 32:411, as amended.

[46] The Legislature may draw on its experience under Article 319 of the Louisiana Code of Criminal Procedure.

[47] See Memphis Light, Gas & Water Div. v. Craft, supra, — U.S. at —, 98 S.Ct. at 1563, n.15.

mands.[48] These principles defeat the argument of the defendant Cronvich that the JPSO bears no responsibility for informing owners of the bond procedure open to them under section 392(B). The JPSO must take measures to insure that all those whose vehicles have been seized are informed of all the options before them for recovery of their vehicles and of all avenues of redress for potentially erroneous assessments.[49] This group, of course, includes those owners who appear to reclaim their vehicles before enough time has passed for notification by mail.

Finally, under the current scheme, the government's attempts at notice are not "reasonably calculated, under all of the circumstances," to reach interested parties or convey the required information, *Mullane v. Central Hanover Trust Co.*, supra, 339 U.S. at 314, 70 S.Ct. at 657. Although the system by which owners of vehicles impounded at the JPSO yard are sent post cards and/or registered letters is sufficient under this standard,[50] the overall scheme is constitutionally infirm in not providing such notice to owners whose vehicles are being stored at one of the private yards. The activities of the road deputies and radio room dispatcher in attempting to give notice, while laudable, do not provide an adequate substitute for notification mailed to the registered owners. Additionally, follow-up efforts must be made by the JPSO, or its

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[48] Mathews v. Eldridge supra, 424 U.S. at 334, 96 S.Ct. at 902.

[49] See Memphis Light, Gas & Water Div. v. Craft, supra, — U.S. at —, 98 S.Ct. at 1563.

[50] The plaintiffs do not challenge the timing of the notice sent under the current system.

agents, to discover the identity of the registered owner in cases of possible computer delay or mix-up where, as in Brown's case, vehicles remain unclaimed for an unreasonable length of time.

Accordingly, judgment shall be entered declaring unconstitutional and enjoining the challenged JPSO practices and further declaring unconstitutional the provisions of Louisiana Revised Statute 32:392 which relate to the seizure and retention of unoccupied vehicles found in violation of Louisiana Revised Statute 32:143.

/s/ Edward J. Boyle, Sr.
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
September 25, 1978

A-7

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

NO. 76-3123
CIVIL ACTION
SECTION D

GERARD O. BREATH, ETC.

VERSUS

ALWYNN J. CRONVICH, ETC., ET AL

NO. 76-3355
CIVIL ACTION
SECTION D

LLOYD BROWN, ETC.

VERSUS

ALWYNN J. CRONVICH, ETC., ET AL

MEMORANDUM OPINION AND ORDER

(Filed April 5, 1977)

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BOYLE, District Judge:

This litigation focuses upon the practice in Jefferson Parish of towing and impounding illegally-parked or abandoned vehicles and assessing towing and storage fees before the vehicles are released to their owners. The activity is pursued under the authority and direction of the Sheriff of Jefferson Parish, the defendant Cronvich. The Parish, however, does not own a fleet of tow-trucks, and has contracted to have the actual towing and, in some cases, the impoundment and fee collection performed by the defendant companies.[1] The latter are paid a fixed compensation for their services.

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[1] The companies work in separate geographical areas assigned by the Sheriff. The defendants Bayou Wreckers and Jaeger's, Inc. operate in that area of the Parish on the East Bank of the Mississippi River, and, in the absence of an official auto pound, they themselves store the vehicles and collect from the owners certain towing and per diem storage fees prescribed by ordinance, which fees then are transferred to the Sheriff's office. The defendants Dale's Wrecker Service and Sidney's Wrecker Service tow on the West Bank of the River, where the Parish apparently maintains an auto pound for storage and itself collects the necessary fees before the vehicles are released.

The named plaintiffs both claim to have been subjected to the aforementioned practice. Breath alleges that, on August 20, 1976, his truck was ticketed for a parking violation and then towed from where he had parked it on an East Bank residential street. He subsequently was required to pay a towing and storage fee to the defendant Bayou Wreckers, which had towed and impounded the vehicle. The plaintiff Brown avers that his automobile was stolen from him on or about July 17, 1976. It was found on the same day blocking a residential driveway, and was cases, the impoundment and fee collection performed by ticketed and towed away. Several months later, in October of 1976, Brown appeared with proof of title and the vehicle was returned to him by the defendant company which had towed and impounded it. Jaeger's, Inc. No fees were assessed and no prosecution for the parking violation was initiated against Brown.

In these intended class actions, the named plaintiffs seek to represent all those who have had or will have their vehicles towed and impounded in Jefferson Parish, and who have been or will be required to pay non-refundable fees in order to obtain the vehicles' release. The suits are brought under the Civil Rights Act (42 U.S.C. § 1983), the plaintiffs alleging that the aforementioned towing, impoundment and collection practice violates the Due Process clause of the Fourteenth Amendment in that it amounts to the deprivation of property without prior notice or hearing. Declaratory, injunctive and monetary relief is sought.

Following oral argument on an earlier day, we took under submission the following motions urged by various defendants: the motions of Joseph and Sidney Bourgeois,

individually and d/b/a Sidney's Wrecker Service, to dismiss the complaints against them and for summary judgment in their favor in both *Breath v. Cronvich, et al,* C.A. No. 76-3123, and *Brown v. Cronvich, et al,* C.A. No. 76-3355; the motions of Jaeger's, Inc. to dismiss the complaints against it or, alternatively, for summary judgment in its favor in both *Breath* and *Brown;* the motions of Dale Esteves, d/b/a Bayou Wreckers, to dismiss the action against it or, alternatively, to abstain in *Breath;* the motion of Dale's Wrecker Service, Inc., for summary judgment in its favor in *Brown;* the motion of Alwynn J. Cronvich and Dale Esteves to dismiss the complaint or, alternatively, to abstain in *Breath;* and the motions of Cronvich for summary judgment in his favor in *Breath* and to dismiss or, alternatively, for summary judgment in his favor in *Brown.*[2] The motions now may be decided on the basis of the arguments and memoranda of counsel and the relevant evidence, as same appear in the records.

There appears no basis for dismissing the plaintiffs' causes of action on jurisdictional grounds. The argument that the company defendants do not act "under color of

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[2] Other motions were ruled upon at the time of oral argument: We denied as moot the motions to dismiss or abstain in *Breath* and to dismiss in *Brown* which were filed on behalf of William J. Guste, Jr., sued in his official capacity as State Attorney General. Governor Edwin Edwards had been substituted for the Attorney General as a party defendant in both cases. The Bourgeois defendants moved in each proceeding for a more definite statement and/or to limit the sizes of the intended classes, which motions were continued without date inasmuch as we had instructed that only dispositive motions by the defendants would be heard at this time. Finally, we granted the motion of the Jefferson Parish members to dismiss the complaint against them in *Breath.* These individuals were not named as defendants in the *Brown* case.

[State] law" so as to enable a § 1983 claim against them, is belied by the fact that each engages in the challenged towing activity pursuant to a standing agreement with the defendant Cronvich as the Sheriff of Jefferson Parish. To the extent these arrangements have endowed the private companies with authority to perform what traditionally and ordinarily would be the parochial (i.e., public function of seizing private property under law, their conduct has become sufficiently colored with a governmental character to trigger the same constitutional limits as are imposed upon the State. *See Evans v. Newton,* 382 U.S. 296, 298, 299, 86 S.Ct. 486, 488, 15 L.Ed.2d 373 (1966); *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); *Marsh v. Adams,* 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946). The towing of cars, whether by public officials themselves or by private entities under contract, necessarily occurs at the behest of the state and pursuant to a state objective, constituting "State action" for purposes of § 1983. *See Tedeschi v. Blackwood,* 410 F.Supp. 34, 41-42 (D. Conn. 1976). Thus, given the Fourteenth Amendment foundation of the plaintiffs' cases, the two prerequisites of federal jurisdiction over § 1983 claims are satisfied herein: alleged deprivation of a constitutional right, and such deprivation *via* action taken under color of State law.[3]

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[3] The defendant Dale Esteves, d/b/a Bayou Wreckers, contends that Breath's action against it as the party which actually towed his truck involves only a state claim for property damage not cognizable in federal court. But this plaintiff's allegations of damage to his vehicle may be entertained pursuant to our pendent jurisdiction, given the existence of the necessary jurisdictional elements for a federal cause of action against this defendant as well as others.

Likewise groundless is the argument that the plaintiff Brown presents no action cognizable within our Article III jurisdiction because he lacks the necessary standing and his grievance has become moot with the return of his car without imposition of any fee. Brown's personal stake in the outcome of this litigation is rooted in the claim that he suffered actual damages through the continued deprivation of the use of his vehicle even after he appeared to reclaim it. Moreover, the Fourteenth Amendment challenge which Brown has standing to bring on his own, as well as others' behalf is addressed to an ongoing practice in Jefferson Parish, clearly satisfying the Article III requirement of a live, justiciable "case and controversy." *See Tedeschi v. Blackwood,* supra, at 38-41.[4]

Having exercised jurisdiction, we also decline the request of certain defendants in the *Breath* case to abstain

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[4] The defendant Jaeger's insists there is no Article III case against it in either proceeding for the additional reason that it has engaged in towing activity not under the laws challenged, but only pursuant to LSA-R.S. 32:41, which empowers local authorities in the State to enact ordinances regulating vehicular use, and section 11-91c of the Jefferson Parish Code, which authorizes the Sheriff to impound vehicles violating no-parking regulations and to impose fees for towing and storage. But the plaintiff in *Breath* specifically challenges the constitutionality of section 11-91c. *See Amended Complaint,* ¶ 14a [Record Doc. #38 in C.A. No. 76-3123]. Moreover, Brown's constitutional challenge is broadly directed at "any Parish ordinance and/or any state law . . . relied on . . . as authority" for towing, although no specific reference is made to either LSA-R.S. 32:41 or section 11-91c. *See* Amended Complaint, ¶ 21 [Record Doc. #15 in C.A. No. 76-3355]. In any event, Article III does not require the opposing pleadings in these cases coincide as to which statutes/ordinances provide towing authority and which are unconstitutional. It is sufficient that Jaeger's has participated in the overall *practice* of which plaintiffs complain.

pending the state criminal action against this plaintiff.[5] Breath was ticketed for the parking violation which precipitated towage of his vehicle, and is being prosecuted pursuant to a State statute (LSA—R.S. 32:143) which defines that violation, without any reference to *towing*. Since the abstention doctrine formulated in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and its progeny contemplates a federal plaintiff with the existing opportunity to raise his constitutional challenge in a state proceeding, that doctrine is rendered inapposite here. Breath's due process grievance is a matter completely apart from and irrelevant to the determination of his guilt or innocence on the *parking* charge. Therefore, the considerations of comity and federalism underlying *Younger* are removed, since to abstain in this case would neither avoid interference with nor facilitate the disposition of the state prosecution.[6]

Of the several arguments of movants addressing the merits, two may be rejected summarily: The Bourgeois defendants are not shielded from liability on the basis of the "releases" which owners apparently sign upon their payment of the fees and the return to them of vehicles towed by Sidney's Wrecker Service. *See* Copies of Releases, attached to Bourgeois' Memorandum in Opposition to Class Certification [Record Doc. #22 in C.A. No. 76-

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[5] We earlier ruled that abstention was not justified in the *Brown* proceeding. *See* Minute Entry of 11/12/76 [Record Doc. #9 in C.A. No. 76-3355].

[6] Aside from *Younger v. Harris*, no other doctrines of federal abstention appear applicable to the *Breath* case, and our abstention is hardly warranted merely because the State or Parish may have some interest in the controversy *sub judice*. *See* Hall v. Garson, 430 F.2d 430, 437 n.12 (5 Cir. 1970).

3123; Record Doc. #22 in C.A. No. 76-335]. Although each release recites the owner's agreement to "indemnify and hold harmless" Jefferson Parish officials from "all claims" arising out of the impounding of the vehicle, such language cannot reasonably be construed as a valid (i.e., knowing and intelligent) waiver of the individual's Fourteenth Amendment guarantee of due process—particularly since execution of the release seems necessary in order to recover the very property allegedly seized without due process. The further argument of the defendant Cronvich in *Breath* that the parish ordinances themselves give sufficient public notice of what violations will result in towing may be pertinent to an inquiry whether the ordinances are unconstitutionally vague, but this defendant cannot seriously contend that the due process requirements of both prior notice and hearing are satisfied merely because the taking of property has a specific statutory basis.

There remains the matter of the "good faith" defense, or qualified governmental immunity, which is available to executive officials in actions against them for damages under § 1983. *See Wood v. Strickland,* 420 U.S. 308, 315-22, 95 S.Ct. 992, 997-1001, 43 L.Ed.2d 214 (1975); *Scheuer v. Rhodes,* 416 U.S. 232, 247-48, 94 S.Ct. 1683, 1692, 40 L.Ed.2d 90 (1974). This defense is based upon the official's actual belief in good faith—as well as the existence of reasonable grounds for his belief—that at the time of the challenged conduct what he did was lawful and not violative of the Constitution. *See Scheuer v. Rhodes,* supra, 94 S.Ct. at 1692. Thus, the appropriate standard to apply contains both an objective and a subjective component, the former involving such facts and

circumstances as indicate a well-supported view of the action's legality and the latter requiring sincerity and the absence of malice on the part of the particular defendant. *See Wood v. Strickland,* supra, 95 S.Ct. at 1000-01.

With a varying degree of specifity and documentation, "good faith" immunity to monetary liability is asserted by all defendant-movants before us. But we must determine the availability of the defense on an individual basis, considering as we do the official discretion and responsibilities in each case as well as the circumstances as they reaonably appeared to each defendant. *See Scheuer v. Rhode,* 94 S.Ct. at 1692. At the same time, and for present purposes only, it must be assumed with respect to *all* defendants that their towing activity constitutes a deprivation of property without due process, as plaintiffs alleged. Governmental immunity in § 1983 actions is an affirmative defense, consideration of which presupposes at least a *prima facie* case of liability.

The defendant Cronvich contends that he "did not intend [to] deprive the plaintiff [Brown] of any constitutional right," and that, as to Breath, this tow resulted from a parking citation issued under LSA-R.S. 32:143 in the "good faith" belief that the statute was valid and applicable. *See* Memorandum of Cronvich in Support of Motion to Dismiss/for Summary Judgment in *Brown,* at p. 1 [Record Doc. #10 in C.A. No. 76-3355]; Memorandum of Cronvich in Support of Motion for Summary Judgment in *Breath,* at p. 3 [Record Doc. #33 in C.A. No. 76-3123]. Yet, only affidavits of two Jefferson Parish Deputy Sheriffs, Paul Bravata and Richard Thompson, are submitted in support of the motion, neither addressing the question of the good faith of Sheriff Cronvich at the time Brown's

vehicle was towed. Moreover, although the affidavit of Cronvich himself which accompanies his motion in *Breath* does aver that he believed LSA-R.S. 32:143 constitutional and that the plaintiff's parking citation thereunder was issued in good faith, the critical issue of the Sheriff's good faith belief in the legality of his office's towing practice is not addressed. Accordingly, we are presented with no competent evidence tending to establish the subjective element of the governmental immunity invoked by this defendant, and such may be denied him without having to consider whether his conduct was reasonable and undertaken in good faith as an objective matter.[7]

With regard to the towing company defendants,[8] Joseph and Sidney Bourgeois, d/b/a Sidney's Wrecker Serv-

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[7] In an argument somewhat related to his claim of good faith, Cronvich suggests that he ought not be made to defend a lawsuit challenging statutes and ordinances which he took no part in enacting. But the legislators who do enact such laws enjoy absolute immunity from monetary liability under § 1933. *See* City of Safety Harbor v. Birchfield, 529 F.2d 1251, 1256-57 (5 Cir. 1976). The thrust of this contention, then, would be to render worthless the promise of monetary recovery in all civil rights actions attacking conduct by state officials under the authority of laws alleged to be unconstitutional.

[8] The plaintiff Brown argues that the "good faith" defense is available to executive officials only, and not to these private companies. We have held, however, that the companies are suable herein precisely because they are challenged for acts performed under color of law and in their capacity as agents of the State. By the same token, they must be viewed as "executive officers" for purposes of the "good faith" defense. As noted by the Supreme Court in *Scheuer* v. *Rhodes*, supra: "It is not the title of [the] office but the duties . . . entrusted . . . which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity. . . ." 94 S.Ct. at 1692, *quoting* Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959).

(Continued on next page)

ice contend that they have acted in good faith in the performance of towing services under contract. *See* Memorandum of Bourgeois in Support of Motion to Dismiss in *Breath,* at p. 2 [Record Doc. #26 in C.A. No. 76-3123]; Memorandum of Bourgeois in Support of Motion to Dismiss in *Brown,* at p. 2 [Record Doc. #25 in C.A. No. 76-3355]; Memorandum of Bourgeois in Support of Motion for Summary Judgment in *Breath,* at p. 4 [Record Doc. #28 in C.A. No. 76-3123]; Memorandum in Support of Motion for Summary Judgment in *Brown,* at p. 4[Record Doc. #28A in C.A. No. 76-3355]. The defendant Dale's Wrecker Service, Inc. argues likewise. *See* Memorandum of Dale's Wrecker Service in Support of Motion for Summary Judgment in *Breath,* at p. 4 [Record Doc. #39 in C.A. No. 76-3123] Memorandum of Dale's Wrecker Service in Support of Motion for Summary Judgment in *Brown* [Record Doc. #29 in C.A. No. 76-3355]. The defendant Dale Esteves, d/b/a Bayou Wreckers, adopts and incorporates these (and other) arguments of its co-defendants. *See* Memorandum of Esteves in Support of Motion to Dismiss in *Breath,* at p. 2 [Record Doc. #32 in C.A. No. 76-3123]. None of these defendants, however, furnishes any support for such conclusional allegations of good faith. What affidavits are submitted address only the issue of "State action," discussed *supra,* without references to even the subjective "good faith" element of governmental immunity. Under these circumstances—and

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At the same time, it perhaps would be more accurate to describe the defense available to such defendants as "quasi-official immunity," analogizing their situation to that of private individuals who may invoke the privilege of "quas-judicial immunity" when sued for their actions as officers of the judiciary. *See,* e.g., Burkes v. Callion, 433 F.2d 318 (9 Cir. 1970).

without intimating whether the defense would be available to such parties is properly supported—we are constrained to deny the motions to the extent this issue is raised therein. An affirmative defense cannot be established solely on the basis of the arguments of counsel.

The defendant Jaeger's, Inc., on the other hand, not only argues that it in "good faith" relied upon the constitutional validity of the parish towing ordinance when it engaged in the activity complained of, but also submits the affidavit of the company president, Donald Jaeger, who swears that Jaeger's "has always operated . . . in the firm belief that [it] was complying with all laws" of Jefferson Parish and the State. *See* Affidavit of Donald Jaeger and Memorandum of Jaeger's in Support of Motion to Dismiss/for Summary Judgment in *Breath* [Record Doc. #27A in C.A. No. 76-3123]; Affidavit of Donald Jaeger and Memorandum of Jaeger's in Support of Motion to Dismiss/for Summary Judgment in *Brown* [Record Doc. #26 in C.A. No. 76-3355]. This evidence of the defendant's personally sincere belief in the legality of its conduct is not controverted by the plaintiffs.

In our view, considering the nature of Jaeger's responsibilities and the circumstances appearing to it at times pertinent herein, there existed a reasonable basis for its good faith. The company is not excused from a general awareness of basic constitutional liberties at stake in the seizure and impoundment of private property; but it can hardly be held to the same degree of knowledge in this regard with which governing authorities are charged.[9] Indeed, Jaeger's counsel at oral argu-

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[9] Thus, for example, we assign differing effects to the decision of August 10, 1976 wherein our brother, the Honorable

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ment indicated that, when the company was put on actual notice of the possible legal implications of its activity by the filing of the instant action against it, it ceased all towing in Jefferson Parish. Finally, we recognize that Jaeger's—and the other defendant companies—participated in these matters pursuant to a valid and enforceable contract, and did so only *after* a decision was made by Parish authorities to effectuate the local towing ordinances and state statutes without making provision for prior notice and hearing. The company was entitled to presume not only that these laws were valid as written, but also that the governmental decision not to afford notice and hearing procedure or contract for towing and impoundment services on this basis was a legally sound one.

Our holding that Jaeger's is entitled to invoke the immunity of the "good faith" defense is limited in one sense, for the defense operates as a shield against monetary liability only and has no application to the plaintiffs' additional prayers for declaratory and injunctive relief. *See Rowley v. McMillan*, 502 F.2d 1326, 1331-32 (4 Cir. 1974). But the basic thrust of any judicial declaration or injunctive prohibition herein will be directed against the defendant Sheriff, and not against Jaeger's or any of the other towing companies. Since it is only through the

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Morey L. Sear, declared the similar towing practice in Orleans Parish violative of due process. *See* H. C. Remm, et al v. Moon Landrieu, et al, C.A. No. 76-3(G). While a development of such a legal-political nature can reasonably be construed to have put the local government and its officials in the neighboring Parish of Jefferson on notice that their towing activity might be constitutionally infirm, we are not inclined to extend the same constructive notice to private wrecker companies simply because they served under contract as arms of Parish authority.

Sheriff's office that these companies tow and impound vehicles, any injunctive order aimed at the activity would be redundant to the extent it encompassed the companies as well as the Sheriff, and, indeed, would be easily vitiated as to whatever company decided—as apparently Jaeger's has—to simply terminate its contractual arrangements with the Sheriff. Having concluded, therefore, that Jaeger's is entitled to shield itself against monetary liability by virtue of its "good faith" defense, we are not inclined to mandate this party's continued presence in the litigation solely for the purposes of a remedy more properly pursued and obtained against another defendant. Accordingly, exercising our broad authority as a court of equity in the fashioning of appropriate non-pecuniary relief, we dismiss the remaining claims for declaratory judgment and an injunction against Jaeger's.

For the foregoing reasons, all motions of the defendants now before us should be, and they are hereby, *DENIED*,[10] save for the motions of the defendant Jaeger's, Inc. for summary judgment in its favor, dismissing the plaintiffs' actions against it with costs, which motions should be, and they are hereby, *GRANTED*.

/s/ Edward J. Boyle, Sr.

UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
April 4, 1977

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[10] At oral argument we granted leave to the defendant Dale's Wrecker Service, Inc. to file a motion for summary judgment in the *Breath* case, to be submitted based upon the argument of counsel for the Bourgeois defendants in support of their motions. That motion now having been duly filed and submitted, we find that it too should be, and it is hereby, *DENIED*.

A-8

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NO. 76-3123 CIVIL ACTION SECTION D

GERARD O. BREATH, ETC.

VERSUS

ALWYNN J. CRONVICH, ETC., ET AL

NO. 76-3355 CIVIL ACTION SECTION D

LLOYD BROWN, ETC.

VERSUS

ALWYNN J. CRONVICH, ETC., ET AL

NOT CONSOLIDATED

MEMORANDUM OPINION AND ORDER

(Filed July 21, 1977)

• • •

BOYLE, District Judge:

Following oral argument on a prior day, we took under submission various motions urged in these actions: the motion of the plaintiff Breath to reconsider our earlier granting of summary judgment in favor of the defendant, Jaeger's Inc., whereby both actions against the latter were dismissed; a motion by the plaintiff Brown to vacate and/or reconsider that ruling; the motions of the defendants Joseph and Sidney Bourgeois, individually and d/b/a Sidney's Wrecker Service, of the defendant Dale's Wrecker Service and of the defendant Dale Esteves, d/b/a Bayou Wreckers, for summary judgment dismissing both actions against these defendants; and the

motions of the defendant Alwynn J. Cronvich for summary judgment dismissing both actions against him.[1]

In support of their motions to reconsider, plaintiffs aver that the defendant Jaeger's Inc. has retained those towing and storage fees which it collected during the life of its contractual arrangement with the Sheriff to tow and impound cars on the East Bank of the River. The veracity of this information was confirmed during oral argument. Counsel for both Jaeger's and the other East Bank towing company, Bayou Wreckers, admitted that these defendants, as compensation for the services they rendered to the Parish, were allowed to keep whatever fees they collected. It thus appears necessary to correct, and we do so *via* minute entry, that portion of our opinion of April 4, 1977 wherein we represented that the two East Bank towing companies which themselves collected fees then transferred same to the Sheriff's office. *See* Mem. Opinion and Order of 4/4/77, at p. 2 n.1 [Record Doc. #40 in C.A. No. 76-3123 and Record Doc. #35 in C.A. No. 76-3355].[2]

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[1] Also argued were motions by both plaintiffs to continue the hearing on all dispositive motions in the cases—which we denied—and motions by plaintiffs to sever the issue of liability, to certify a class action and to consolidate the two actions —which motions we continued without date.

[2] Oral argument on the instant motions, as well as deposition testimony occurring subsequent to our earlier opinion, further reveal that the same portion of the latter was erroneous in two other respects.

We noted the absence of an "official auto pound" on the East Bank. Sheriff Cronvich has since testified, however, that his office does have an auto pound on the East Bank, although the facility is too limited to permit its use for storing vehicles

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At the same time, our view that the defendant Jaeger's should be dismissed from these actions remains unaltered. Jaeger's retained the fees it collected from the owners of towed vehicles simply as the agreed-upon method of its compensation under contract. This method of payment could not influence the towing activity of the company. A tow occurs only at the direction of the Sheriff's office; and, at the time the fees were collected by Jaeger's, the amount thereof was predetermined as a matter of law.[3] Simply because it retained the fees, then, Jaeger's was no less entitled to the good faith presumption that it was acting pursuant to valid governmental authority, and that the decision of Parish authorities not to afford notice and hearing prior to the towage of vehicles or imposition of fees was a legally sound one. *See id.* at pp. 15-16.

Plaintiffs argue that, to the extent class-wide restitution is sought herein, retention of the fees renders Jae-

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towed for parking violations. *See* Cronvich Dep., at 6, 10-11 [Record Doc. #58 in C.A. No. 76-3123]. We also declared it to be our understanding that the Parish maintains a West Bank pound for storing vehicles. But oral argument disclosed that on the West Bank, just as on the East Bank, vehicles are towed to and stored at the business premises of the towing companies.

[3] Under state statute, a motor vehicle towed and impounded for illegal parking, stationing or abandonment is released upon the owner's payment of such costs and charges as may be fixed by the local policing authority or municipality. *See* LSA-R.S. 32:472. According to the deposition testimony of Sheriff Cronvich, the towing fee in Jefferson Parish has been set at $20.00. *See* Cronvich Dep., at 8 [Record Doc. #58 in C.A. No. 76-3123]. A *per diem* storage fee is prescribed by ordinance in the case of both abandoned and illegally parked vehicles which have been impounded. *See* Jeff. Parish Code, §§ 11-71.4 and 11.91(c).

ger's a necessary party to the actions. But having found that this defendant must be absolved of any liability for damages on the basis of its good faith defense, we are no more inclined to require its continued presence in the litigation for refund purposes than we were for purposes of injunctive relief. Just as the real thrust of any injunctive order we might enter would be directed against the Sheriff as the official under whose authority towing in Jefferson Parish occurs, it is the Parish government, through this same executive official, which will be held accountable for refunding whatever money might be found to be refundable. The money retained by Jaeger's albiet flowing directly to it from vehicle owners and generated as a result of the Parish towing policy, is in essence payment by the Sheriff to the company for services rendered. It is hardly the necessary or proper target of the prayer for restitution.

In moving for summary judgment, the remaining defendant companies claim that, like Jaeger's, they are entitled to assert the good faith defense recognized in actions under 42 U.S.C. § 1983. *See Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). All three have now cured the evidentiary problem we noted in our earlier opinion by submitting affidavits tending to establish that they acted in good faith and firmly believing that their towing activity under contract was in compliance with the law. *See* Affidavit of Joseph & Sidney Bourgeois, att'd to Motions of Joseph & Sidney Bourgeois, d/b/a Sidney's Wrecker Service, for Summary Judgment [Record Doc. #43 in C.A. No. 76-3123

and Record Doc. #37 in C.A. No. 76-3355]; Affidavit of Dale Mitchell, att'd to Motions of Dale's Wrecker Service for Summary Judgment [Record Doc. #46 in C.A. 76-3123 and Record Doc. #40 in C.A. No. 76-3355]; Affidavit of Dale Esteves, att'd to Motions of Dale Esteves, d/b/a Bayou Wreckers, for Summary Judgment [Record Doc. #48 in C.A. No. 76-3123 and Record Doc. #42 in C.A. No. 76-3355]. Nothing appears in the record to suggest actual malice on the part of these defendants, and we regard their professions of subjective good faith as effectively uncontroverted.[4]

As to whether such sincere motivation can be considered reasonable under the circumstances of these cases, we perceive no justification for distinguishing the involvement in these matters of Sidney's Wrecker Service, Bayou Wreckers, or Dale's Wrecker Service, from that

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[4] Both plaintiffs filed affidavits opposed to the motions. The affidavit of Brown, however, (on which we note no original signature of the affiant appears) is not germaine to the instant question, since it merely recites the circumstances under which this plaintiff's automobile was towed and impounded by *Jaeger's*. *See* Brown Affidavit, att'd to Plaintiff's Opposition Memo [Record Doc. #45 in C.A. No. 76-3355]. Breath's affidavit states his personal belief that the defendants knew or should have known that what they were doing was unconstitutional. *See* Breath Affidavit in Opposition [Record Doc. #52 in C.A. No. 76-3123]. Rule 56 requires, however, that a response to a motion for summary judgment set forth "specific facts" showing there is no genuine issue for trial. *See* Rule 56(e), F.R.Civ.Pro.

Additionally, although all three defendant companies include declarations of their good faith in the statements of undisputed material facts accompanying their motions, neither plaintiff has complied with Local Rule 3.10 of this court, requiring a responsive statement of those facts as to which it is contended a genuine issue for trial exists. Under Rule 3.10, the facts set forth by a movant are deemed admitted unless so controverted.

of Jaeger's. Although all seized property under color of law, it would be unrealistic to hold commercial entities to the same awareness of their conduct's constitutional implications as we do the official(s) at whose behest and under whose aegis they acted. Rather, the remaining company defendants—no less than Jaeger's—were entitled to the reasonable expectation that their performance under binding contracts entered into with the Sheriff had a sound legal basis.

In the absence of any genuine issue of material fact, we, therefore, find as a matter of law that the three defendant companies satisfy both the subjective and objective criteria of the good faith defenses they assert against plaintiffs' claims for damages. Moreover, as in the case of our dismissal of Jaeger's, we are compelled by considerations of simple equity to dismiss the remaining claims against such parties with the failure of the action for damages. Any award of equitable relief herein in essence must be directed against Sheriff Cronvich as the official charged with executing the challenged towing policy of the Parish; and there seems to be little point in retaining the towing companies as parties simply for the purposes of declaratory, injunctive, or restitutional relief. *See* Mem. Opinion and Order of 4/4/77, at pp. 16-17 [Record Doc. #40 in C.A. No. 76-3123 and Record Doc. #35 in C.A. No. 76-3355]; pp. 4-5, *supra.*

The summary judgment motions of Sheriff Cronvich are primarily grounded upon the same defense of good faith.[5] The defendant states by way of affidavit that his

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[5] The additional contention is made in memoranda that the challenged towing and impoundments occur only in the

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towing and impoundment of plaintiffs' vehicles were accomplished in "good faith, with just cause [and] under statutes believed applicable." *See* Affidavit of Alwynn Cronvich, att'd to Motions of Cronvich for Summary Judgment [Record Doc. #47 in C.A. No. 76-3123 and Record Doc. #41 in C.A. No. 76-3355].[6] Also submitted are the affidavits of Harley Roberts and Paul Bravada, Sheriff's officers who ticketed and called for the two of Breath's and Brown's vehicles, respectively, and who attest to the good faith performance of towing practice and procedure under Sheriff Cronvich. *See* Affidavit of Harley Roberts, att'd to Motion of Cronvich for Summary Judgment [Record Doc. #47 in C.A. No. 76-3123]; Affidavit of Paul Bravada, att'd to Motion of Cronvich for Summary Judgment [Record Doc. #41 in C.A. No. 76-3355]. Finally, contained in statements of fact accompanying both motions is the declaration that the towing, etc. was performed in good faith and under laws believed applicable. *See* Statements of Uncontested Issues of Fact, att'd to Motions of Cronvich for Summary Judgment

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event of criminal violations, and that greater authority to seize property is allowed government officials in criminal than in civil matters. Admittedly, the Due Process Clause does not purport to guarantee notice and hearing prior to police conduct in emergency situations or under exigent circumstances —such as in the case of warrantless searches and seizures. But it is clearly specious to reason that such exigencies and limits on due process necessarily arise whenever abandoned and illegally parked vehicles are towed as well as when owners appear to secure their release.

[6] Although the fact is of little practical significance due to our disposition of the defendant's motion, *infra*, we nonetheless note that the sworn document filed in the *Breath* record (C.A. No. 76-3123) is a copy of the Sheriff's affidavit and affiant's original signature is not affixed thereto.

[Record Doc. #47 in C.A. No. 76-3123 and Record Doc. #41 in C.A. No. 76-3355]. Such facts are admitted under Local Rule 3.10 due to plaintiffs' failure to submit opposing statements of factual issues in dispute. *See* note 3, *supra*.

Yet, even given the defendant's honest belief in the legality of his conduct—and assuming, as we must for purposes of considering his affirmative defense, that the Parish towing practice *is* violative of the Fourteenth Amendment—it remains to be seen whether the Sheriff's belief was objectively reasonable and legally well-founded. Alwynn Cronvich is both an attorney-at-law and the Sheriff of Jefferson Parish since 1964. *See* Cronvich Dep., at 4 [Record Doc. #58 in C.A. No. 76-3123]. One in his position generally should be expected to possess a greater appreciation of the law's requirements than the average layman, and also to have considerable practical experience concerning the relationship between governmental authority and the rights of individual citizens. More particularly, it is hardly unfair to assume that, during the time pertinent hereto, the Sheriff at least became aware of the potential vulnerability of his towing as a result of a decision by our brother, the Honorable Morey L. Sear. On August 10, 1976, i.e., between the tow of Brown's car on July 17 and that of Breath's vehicle on August 20, Judge Sear ruled that the portion of the New Orleans City Code authorizing the assessment of towing and storage fees without notice and hearing was violative of the Due Process Clause. *See Remm v. Landrieu*, 418 F. Supp. 542 (E.D. La. 1976).[7]

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[7] We intend no impeachment of the Sheriff's deposition testimony that he did not hear or read about the *Remm* opin-

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The objective component of good faith entails a belief that is reasonably well-supported as a matter of law. Whatever circumstances may present themselves to distinguish the towing procedure followed in Orleans Parish at the time of the *Remm* decision and that now followed in Jefferson, the fact remains that another judge of this court has perceived constitutional infirmity in the failure to afford notice and hearing prior to the assessment of fees for the towing and impoundment of illegally-parked vehicles—which is identical to one of the plaintiffs' constitutional challenges herein.[8] Apparently the defense of good faith was not before Judge Sear.[9] But in a decision cited in *Remm* and involving a police practice of seizing and impounding the vehicles of arrested persons without adequate notice or the opportunity for a hearing, the district court rejected the defense on the ground the deprivation of property without due process in that case was "patently unreasonable." *See Seals v. Nicholl*, 378 F.Supp. 172, 179 (N.D. Ill. 1973). Without intimating that we would so hold *sub judice*, we nevertheless conclude that, in light of his background and position

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ion when it was announced. *See* Cronvich Dep., at 26 [Record Doc. #58 in C.A. No. 76-3123]. Having assumed the personal good faith of the defendant, our inquiry is whether it is reasonable to charge one in his position with *constructive* notice of *Remm*.

[8] Indeed, plaintiffs point to a factual distinction between the procedures which they claim makes the Jefferson Parish practice *more* susceptible to constitutional challenge. If found not guilty of the parking violation charged, a vehicle owner in Orleans Parish is refunded any fees which have been collected. *See* 418 F.Supp. at 544. In Jefferson Parish, the fees imposed are non-refundable.

[9] His opinion states that the question of damages was reserved for a later trial. *See* 418 F. Supp. at 543.

and considering the existing principles of law relevant to these proceedings, Sheriff Cronvich is not entitled to summary judgment dismissing the 1983 claim for damages on the basis of his asserted good faith defense.

Accordingly, the motion of the plaintiff Breath and that of the plaintiff Brown to reconsider our earlier granting of summary judgment in favor of the defendant Jaeger's Inc., should be, and they are hereby, *DENIED.* The motions for summary judgment in both of the above-captioned actions which are urged on behalf of the defendants Joseph and Sidney Bourgeois, d/b/a Sidney's Wrecker Service, the defendant Dale's Wrecker Service and the defendant Dale Esteves, d/b/a Bayou Wreckers, should be, and they are hereby, *GRANTED,* dismissing plaintiffs' actions against these defendants with costs. The motions of the defendant Alwynn Cronvich for summary judgment in both of the above-captioned actions should be, and they are hereby, *DENIED.*

/s/ Edward J. Boyle, Sr.
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
July 21, 1977

A-9

(p. 1)

FIRST PARISH COURT
PARISH OF JEFFERSON
3100 CLEARVIEW PARKWAY
METAIRE, LOUISIANA

CRIMINAL DOCKET NUMBER 283439
DIVISION "B"

THE STATE OF LOUISIANA

Versus

JERARD BREATH (sic)

Testimony taken in the above numbered and entitled cause before the Honorable JAMES M. LOCKHART, Jr., Presiding Judge, on May 6, 1977.

APPEARANCES:

STEPHEN M. LITTLE, Esq.
Attorney. Assistant District
Attorney representing the State
of Louisiana

ROBERT HERRIN, Esq. (sic)
Attorney for the Defendant

COURT REPORTER: Elvina P. Bourgeois—OCR

(p. 2)

PROCEEDINGS

MR. HERRIN:

Your Honor, my name is Robert Herrin. I represent Mr. Jerard Breath.

According to the legislative filed in this matter, we ask that the parking ticket be quashed, in that it fails to apprise the Defendant of the conduct that is due him un-

der the law. It fails to—both the parking ticket and the Bill of Information, fail to properly apprise him of the specific section of article 32:143 of which he is charged. And, additionally, that article RS 143 is unconstitutional. And, the third reason is that in 143, the Defendant is not charged with the violation of article 143 under the information made and subject to this case.

MR. LITTLE:

Your Honor, I believe, for the record, that the face of the bill reads—If I could have it, I would like to do it correctly. First, (p. 3) on the Bill of Information, reads—RS 32:143. Parking on an intersection causing an obstruction of view. My point is, that while I would agree with Counsel, that there is no part of section 143 that says anything about parking in an intersection that is obstructing view, but there is a section that talks about obstructing traffic signals. I don't intend to say just what that is meant to be. This just says obstructing view, and it's very clear. Consequently, my point of argument would be that the Defendant has been appraised of the crime and violation RS 32:143. And, that the proper section and proper portion of that law is correctly determined by the Bill of Particulars. I think the record is clear, that the Defendant did file a Bill of Particulars and in the Bill of Particulars, he has asked the State to file a request, namely, the Bill of Particulars says what specific act or omission by the Defendant (p. 4) as the Parish contends, on the form basis of an alleged offense, to in response thereto, the State said—vehicle parked five to seven feet from intersection, on sidewalk, blocking view from vehicles near the intersection. On sidewalk, in that answer, is specifically a portion of section 143. That is, the State has now

identified and informed the Defendant fully of his charges against him, and the back of the face of the bill says, obstructing view. I would say it is not a defect to warrant a motion to quash, perhaps he could be subject to an order to amend by the Court, but, the substantial element, I agree, is in the announcement of article 143, is present on the face and I think that is sufficient.

MR. HERRIN:

In reply, thereto, your Honor, I would say most of the Bill of Particulars says—what specific acts or omissions by the Defendant do you contend on the basis of the alleged offense, and it says—(p. 5) parking at an intersection, obstructing view. There is no such offense. I say that for reasons of fundamental fairness he be treated like any other Parish citizen and that this matter be dismissed.

THE COURT:

Allright. I have considered the matter. I have read the Bill of Information as it has been written and adopted by the D.A. Parking, it says in the Bill of Particulars RS 32:143—Parking at an intersection, obstructing view. I have read the Bill of Particulars and the answer by the State saying that the charge is parking on the sidewalk. I feel that as far as the motion to quash is concerned, and as I see it, the Bill of Information is improper and a motion to quash should be granted on that basis.

I do not believe, first of all, I do not believe that I can order the D.A. to amend any Bill of Information and second, the D.A. could only amend the Bill of (p. 6) Information and subsequently to the amendment as such.

Third, I don't think that the D.A. can cure a defective Bill of Information by reciting the correct information for the Bill of Information in a Bill of particulars. So, at this time, the oral motion to quash is granted.

MR. LITTLE:

Your Honor, at this time I respectfully request that I be given a return date at which time I can file writs to the Supreme Court.

MR. HERRIN:

Your Honor, at this time I would request that the Court return the Defendant's twenty dollars for the towing fee.

THE COURT:

Can you show me a procedure?

MR. HERRIN:

There is none.

THE COURT:

I think you have this in Federal Court.

MR. HERRIN:

Well, it's the Parish's. (p. 7) One of the Defense to that idea is that you may have the power to return the money.

THE COURT:

Tell me how I have the power to return the money?

MR. HERRIN:

I don't think you do.

THE COURT:

If you file the proper pleading in my Court, I will return the money I owe.

MR. HERRIN:

Could I ask your Honor one question. Can you tell me what type of pleading that would be?

THE COURT:

I don't know. I think you're correct. There is no mechanism as I know of to return what is owed.

MR. HERRIN:

Thank you, your Honor.

(p. 8) I, Elvina P. Bourgeois, Official Court Reporter in and for the Parish of Jefferson, State of Louisiana, do hereby certify that the foregoing transcript of November 22, 1976, in Case No. 283439 is true and correct to the best of my knowledge and ability and understanding.

I further certify that I am not of Counsel, not related to Counsel or the parties to the cause and that I am not interested in the outcome of the event.

Elvina P. Bourgeois

Official Court Reporter

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally came and appeared one ELVINA P. BOURGEOIS, Official Court Reporter, who, after being first duly sworn, did depose and say that:

I, Elvina P. Bourgeois, am an Official Court Reporter in and for the Parish of Jefferson, State of Louisiana. I do hereby certify that the foregoing transcript of Court Proceedings held in the First Parish Court of the Parish of Jefferson, State of Louisiana on May 6, 1977, in cause No. 283-439 i.e. The State of Louisiana v. Gerard O. Breath, is true and correct to the best of my knowledge and ability and understanding.

I further swear and certify that I am not of Counsel, not related to Counsel or the parties to the cause and I am not interested in the outcome of the case.

/s/ Elvina P. Bourgeois
ELVINA P. BOURGEOIS

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 16th DAY OF DECEMBER, 1977

/s/ Thomas G. Donelon
NOTARY PUBLIC

A-10

Date..... Item No.....

ATB No. .....

The following described vehicle was impounded on ..... 19....., and is stored at the Sheriff's Auto Pound, 3300 Metairie Road, Metairie, Louisiana.

Make & Color .....

Model..... Serial/Motor No. .....

License No. ..... State & Year .....

This vehicle may be claimed by owner presenting proof of ownership & self-identification upon payment of towage fee plus One (1) dollar per day storage fee for the first five (5) days of impoundment and Three (3) dollars per day thereafter.

If you no longer own this vehicle, please notify this office by calling 834-7700 ext. 275 or 276.

Alwynn J. Cronvich, Sheriff

BY: .....
Commander, Auto Pound

A-11

Louisiana Sheriffs' Association Member

National Sheriffs' Association Member

ALWYNN J. CRONVICH

SHERIFF AND TAX COLLECTOR
PARISH OF JEFFERSON
3300 METAIRIE ROAD
METAIRIE, LOUISIANA 70001

834-7700 EAST BANK

ITEM NO. .....

A.T.B. TAG .....

Dear Mr.

The following described vehicle was impounded on ..... 19 ..... and is stored at the Sheriff's Auto Pound, 3300 Metairie Road, Metairie, Louisiana.

Make & Color .....

Model..... Serial/Motor No. .....

License No. ..... State & Year .....

This vehicle may be claimed by owner by presenting this notice with title or proof of ownership and self-identification upon payment of twenty (20) dollars towage fee plus one (1) dollar per day storage fee for the first 5 days after impoundment and three (3) dollars a day thereafter.

If you fail to claim vehicle within sixty (60) days from the date it was impounded, this will necessitate dis-

posal of vehicle in accordance with statutes of the State of Louisiana and Ordinance of Jefferson Parish.

Alwynn J. Cronvich, Sheriff

BY: _____
Commander, Auto Theft
Bureau

A-12

TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES

USCA Constitution Amend. 14 § 1, 5

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 USCA § 1343

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured

by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 USCA § 2201

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of Title 11, any court of the United States, upon the filing of an appropriate pleading may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 USCA § 2202

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 USCA § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a Statute of the District of Columbia.

La.Rev.Stat.Ann. 15:88 (West 1984)

The term "appearance bond" shall be taken and intended to mean every bail bond, recognizance or other obligation, or deposit of cash, checks, negotiable bonds or money orders made or taken to secure the appearance of any persons before any court; but in all cases where cash, checks, negotiable securities or money orders have been deposited in lieu of bond with a surety, in case of discharge or forfeiture, the same shall be disposed of as otherwise provided by law.

La.Rev.Stat.Ann. 32:143(A) provides:

No person shall stand, or park a vehicle, except when necessary to avoid conflict with other traffice, or in compliance with law or the directions of a police officer or traffic control device, in any of the following places:

(1) On a sidewalk;

(2) In front of a public or private driveway;

(3) Within an intersection;

(4) Within fifteen feet of a hydrant;

(5) On a cross walk;

(6) Within twenty feet of a cross walk at an intersection

(7) Within twenty feet upon the approach to any flashing beacon stop sign, or traffic control signal located at the side of a roadway;

(8) Between a safety zone and the adjacent curb, or within twenty feet of points on the

curb immediately opposite the ends of a safety zone;

(9) Within fifty feet of the nearest rail of a railroad crossing;

(10) Within twenty feet of the driveway entrance to any fire station, and on the side of a street opposite the entrance to any fire station within seventy-five feet of said entrance, when properly posted;

(11) Alongside or opposite any street excavation or obstruction when stopping, standing, or parking would obstruct traffic;

(12) On the roadway side of any vehicle stopped or parked at the edge or curb of a street;

(13) Upon any bridge or other elevated structure upon a highway or within a highway tunnel;

(14) At any place where official signs prohibit such;

(15) Any place where parking will obscure or obstruct visibility of any traffic control device.

La.Rev.Stat.Ann. 32:392 (West Supp. 1983)

A. Upon discovery of any vehicle in any manner operated in violation of this Chapter, the vehicle may be impounded forthwith by any state policeman, any authorized representative of the commissioner, any peace officer, or weights and standards policy officer of the department except that any overweight or oversize vehicle registered in Louisiana and carrying perishable product or products once loaded which become indivisible shall not be impounded but shall be directed to and followed by the weights and standards police officer or state policeman to the nearest appropriate place suitable for unloading to its licensed gross weight or maximum size requirements as provided in this Chapter and storage of said prod-

ucts to preserve it for its intended use in commerce and in either case storage of said produce to preserve it for its intended use in commerce and in either case storage of said produce to preserve it for its intended use in commerce and in either case shall be detained or unloaded at the expense and responsibility of the owner or driver.

When used in this Subsection, the following words and phrases have the following meanings:

(1) "Perishable products" means products which are subject to lose their commercial avlue or decay in a short period of time, including but not limited to agricultural or seafood products and concrete.

(2) "Products once loaded which become indivisible" means products divisible by nature, but which become idivisible once loaded upon a vehicle because of the required manner or method of unloading would be such that the entire load or portion of the load required to be unloaded could not be preserved for its intended use in commerce, or which endangers the public safety, including but not limited to forest products in their natural state.

B. A vehicle impounded for violations of the provisions of this Chapter other than R.S. 32:380 through 32:387 shall be detained until released by any court or committing magistrate having jurisdiction over the offense. The court or committing magistrate having jurisdiction over an offense involving a vehicle shall not order or allow the release of the vehicle prior to the full satisfaction of all penalties or charges assessed on account of the offense, except upon the execution of an appearance bond in the maximum amount of such penalties and charges, with good and solvent surety approved by the court or committing magistrate.

C. Vehicles impounded for violations of the provisions of R.S. 32:380 through R.S. 32:387 shall be detained until all penalties or charges assessed on ac-

count of the violation have been paid as provided in R.S. 32:389, except as provided in Subsection A of this Section.

La.Rev.Stat.Ann. 32:411, as amended
(See Attached)

§ 411. Deposit of license in lieu of security upon arrest; receipt; licensee to have license or receipt in immediate possession; notification to vehicle owner

A. Whenever any person lawfully possessed of a chauffeur's or operator's license issued to him by either:

(1) The Department of Public Safety; or

(2) The appropriate agency of another state if such person resides in this state and either:

a) Is on active duty with the armed forces of the United States; or

b) Is a dependent of any person described in (a) above; or

c) Is enrolled in a Louisiana college or university

is arrested and charged with a violation of the Louisiana Highway Regulatory Act or any municipal or parish ordinance regulating traffic in any municipality or in any parish he shall have the option of depositing his chauffeur's or operator's license with the arresting officer in lieu of bail. The arresting officer shall immediately forward any license so deposited to the sheriff, district attorney, or city court clerk of the parish in which the charge is filed, except in the Parish of Orleans, where the license shall be forwarded to the clerk of the Traffic Court. Additionally, any person described in Paragraph (2) above must also furnish satisfactory proof of his residency in this state by either providing the arresting of-

ficer with a copy of orders assigning him, or the person whose dependent he is, to an area inside Louisiana or with a valid student identification card issued by a Louisiana college or university.

This Subsection does not apply when the arresting officer has probable cause to believe that the person charged has committed an offense as defined in Title 14 of the Louisiana Revised Statutes of 1950. The arresting officer shall take these persons forthwith before the nearest or most accessible magistrate having jurisdiction.

B. Whenever any person as described in Subsection A hereof deposits his chauffeur's or operator's license as provided in said Subsection, the arresting officer shall issue said person a receipt for said license upon a form approved or provided by the Department of Public Safety, and thereafter said person shall be permitted to operate a motor vehicle upon the public highways of this state during the pendency of the case in which the license was deposited.

C. The district attorney, sheriff, or clerk of a court accepting the license as provided in Subsection A hereof, shall forward as soon as practicable to the Department of Public Safety, the license of a driver deposited in lieu of bail if the driver fails to appear in answer to the charge filed against him. The department shall not return, reissue, or renew the license until authorized to do so by the forwarding court.

D. The licensee shall have his license in his immediate possession at all times when driving a motor vehicle and shall display it upon demand of any officer or agent of the department or any police officer of the state,

parish or municipality, except that where the licensee has previously deposited his license as provided in Subsection A hereof, and has received a receipt, as provided in Subsection B hereof, the licensee shall display the receipt upon demand of any officer or agent of the department or any police officer of the state, parish or municipality, the same to serve as a substitute for the license until the license is returned to the licensee.

E. When a person is arrested or issued a summons for a violation of R.S. 14:98 or R.S. 14:98.1, the arresting officer shall determine whether the person is the owner of the vehicle used. If the person is not the owner, the arresting officer, his agency of employment, or the Department of Public Safety shall take all reasonable measures to identify and locate the registered owner and notify him of the arrest or summons. Such notification may be oral or written. A record shall be kept of whether or not such notification was given.